NO. 7[illegible]2 MISC

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

MORRIS H. SWITZER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLEE'S APPENDIX

PAUL W. WILLIAMS,
United States Attorney for the
Southern District of New York,
Attorney for Appellee.

UNITED STATES ... FILED ... 14 1957

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Indictment

The trial was against the defendant Morris H. Switzer on the Second and Third Counts of Indictment No. C 138-189.

These counts allege as follows:

SECOND COUNT

1. On or about the 2nd day of February, 1950, an involuntary petition in bankruptcy was duly filed in the United States District Court for the Southern District of New York, praying that Berkeley Jewelers, Inc. be adjudicated bankrupt; on or about February 20, 1950, Berkeley Jewelers, Inc. was duly adjudicated bankrupt; on or about April 6, 1950, a trustee in bankruptcy was duly elected and qualified to act as trustee on behalf of the estate of said bankrupt.

2. From on or about the 1st day of May, 1950, and continuously thereafter, up to and including the 31st day of May, 1950, at the Southern District of New York, Morris H. Switzer, the defendant, did unlawfully, wilfully, knowingly and fraudulently conceal property belonging to the estate of said bankrupt from the trustee in bankruptcy, consisting of watches, rings and miscellaneous jewelry, the value of which to the Grand Jurors is unknown.

(Title 18, Section 152, United States Code.)

THIRD COUNT

1. From on or about the 15th day of October, 1949, and continuously thereafter, up to and including the time of the filing of the indictment herein, at the Southern District of New York, Albert B. Faskow, Morris H. Switzer, Jack Shulman and Irving Shear, the defendants, and Sam Mintz and Jack Fellerman, named as co-conspirators but not indicted herein, contemplating that a petition in bankruptcy would be filed against Berkeley Jewelers, Inc., that said corporation would be adjudicated a bankrupt, and that there would be insufficient assets in the bankrupt estate to satisfy the claims of creditors, did unlawfully, wilfully, knowingly and fraudulently combine, conspire, confederate and agree together and with each other, and with divers other persons to the Grand Jurors unknown, to commit an offense against the United States, to wit, to violate Title 18, United States Code, Section 152.

2. It was a part of said conspiracy that the defendant, Albert B. Faskow, while an officer of Berkeley Jewelers, Inc., to wit, its President, and Morris H. Switzer, Jack Shulman and Irving Shear, the defendants, and Sam Mintz and Jack Fellerman, named as co-conspirators but not indicted herein, in contemplation of a bankruptcy proceeding against said corporation, and with intent to defeat the bankruptcy law, would cause said corporation to confess to four $1,000. judgments in favor of Jack Fellerman, a co-conspirator herein, and an unsecured creditor of said corporation, and thereby enable the aforesaid Jack Fellerman to become a judgment creditor of Berkeley Jewelers, Inc.

3. It was further a part of said conspiracy that the defendants would cause execution to be had on the aforesaid judgments, and that the assets of the judgment debtor, Berkeley Jewelers, Inc., would be levied upon at a City Marshal's sale and that a receipt for the sale of said assets would be made out to a nominee of the defendants.

4. It was further a part of said conspiracy that the defendants would cause a certificate of incorporation to be filed for a new corporation, namely, Berkeley Pennsylvania Corporation, and that thereafter, in contemplation of a bankruptcy proceeding against Berkeley Jewelers, Inc. and with intent to defeat the bankruptcy law, the assets of Berkeley Jewelers, Inc. would be transferred to Berkeley Pennsylvania Corporation.

OVERT ACTS

1. On or about the 15th day of November, 1949, at the Southern District of New York, the defendants Albert B. Faskow, Morris H. Switzer and Jack Shulman conferred with Nat Shapiro at 44 East 29th Street, New York City.

2. On or about the 1st day of December, 1949, at the Southern District of New York, the defendant Morris H. Switzer had a telephone conversation with Sam Mintz.

3. On or about the 15th day of December, 1949, at the Southern District of New York, the defendant Albert B. Faskow executed four confessions of judgment in favor of Jack Fellerman.

4. On or about the 19th day of January, 1950, at the Southern District of New York, the defendant Morris H. Switzer mailed a certificate of incorporation of the Berkeley Pennsylvania Corporation to the Secretary of State, Albany, New York.

5. On or about the 20th day of January, 1950, at the Southern District of New York, the defendant Morris H. Switzer had a conversation with one Benjamin H. Chassin.

6. On or about the 27th day of January, 1950, at the Southern District of New York, the defendant Morris H. Switzer had a telephone conversation with Sam Mintz.

7. On or about the 28th day of January, 1950, at the Southern District of New York, the defendant Morris H. Switzer had a conversation with City Marshal Abraham Adisky and Sam Mintz at 44 East 29th Street, New York City.

8. On or about the 28th day of January, 1950, at the Southern District of New York, the defendant Jack Shulman went to suite 617 at 1123 Broadway, New York, N. Y.

9. On or about the 1st day of February, 1950, at the Southern District of New York, the defendants Morris H. Switzer and Irving Shear went to suite 617 at 1123 Broadway, New York, N. Y.

(Title 18, Section 371, United States Code.)

Excerpts from Testimony

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 138-189

UNITED STATES OF AMERICA,

vs.

ALBERT B. FASKOW, MORRIS H. SWITZER, JACK SHULMAN and IRVING SHEAR,

Defendants.

Before:

HON. JOHN F. X. McGOHEY, *D. J.*,

and a Jury.

New York, N. Y., April 5, 1956,
10.30 o'clock a.m.

APPEARANCES:

PAUL W. WILLIAMS, Esq., United States Attorney,
for the Government:

By Gabriel B. Schwartz, Esq.,
Assistant United States Attorney.

EDWARD H. LEVINE, Esq.,
Attorney for Defendant Albert B. Faskow.

Appearances

(2)

CURRAN, MAHONEY, COHN & STIM, Esqs.,
Attorneys for Defendant Morris H. Switzer

Menahem Stim, Esq., and
Robert Ferraro, Esq., of Counsel.

ABRAHAM J. GELLINOFF, Esq.,
and
JOSEPH S. GERSHMAN, Esq.,
Attorneys for Defendant Jack Shulman.

AMEDEO L. LACHIANO, Esq.,
Attorney for Defendant Irving Shear.

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(79) * * *

ALBERT FASKOW, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr Schwartz:

Q. Mr. Faskow, what do you do for a living? A. I am an insurance salesman.

Q. And for whom do you work, sir? A. The World Insurance Company.

Q. And where is that, sir? A. In Pittsburgh, Pennsylvania, sir.

Q. You are one of the defendants in the case now on trial? A. I am, sir.

Q. And you have pleaded guilty, sir? A. I have, sir.

Q. What was your business, Mr. Faskow, between the years 1942 and 1950? A. I was in the jewelry business.

Q. What was the name of your jewelry business? (80) A. Berkeley Jewelers, Inc.

Q. What address did that corporation do business from? A. It started in 1942 at 475 Fifth Avenue, New York City.

Q. Did there come a time when you moved? A. I did. In 1948 I moved to 44 East 29th Street.

Q. Who was the president of Berkeley Jewelers, Inc.? A. I was the president of Berkeley Jewelers, Inc.

Q. And who were the stockholders of that corporation? A. I was.

Q. Would you describe the store that you had over on East 29th Street, Mr. Faskow? A. When I moved from 475 Fifth Avenue, which was a small retail store in the building, I moved to larger quarters at 44 East 29th Street to open a discount business, and it was a second-floor loft facing the front, running through the complete building.

Q. Did you have a showroom in that store? A. I did, sir.

Q. About how deep was that showroom? (81) A. Well, it faced the front with about 60 feet deep, 60 to 70 feet deep.

Q. What was the length? A. In length, say. About 20 foot in width.

Q. How was that furnished? A. It was furnished with showcases, six floor showcases and five back-wall cases, with ceiling cases, and on both sides displayed.

Q. Was there a safe? A. Yes, sir, there was a safe at the extreme end of the showroom.

Q. Was there an office? A. There was, sir, facing the safe.

Q. Was merchandise kept in the showcases? A. There was, sir, both in my floor cases and in the wall cases.

Q. What was in the safe? A. In the safe we had

diamond rings, duplicates and other types of gold r
chandise and diamond watches and some of the be
grade of watches were kept in the safe.

Q. Of the merchandise that was kept in the showro
in these display cases, was any ever removed during
evening —

(82)

Mr. Schwartz: Let we withdraw that question

Q. Did all of the merchandise kept in the display ca
stay there 24 hours a day? A. No, sir.

Q. What happened to it? A. In the evening I wo
remove the better type of watches, diamond watches a
diamond rings and place them into the safe and then cl
the safe.

Q. Now, was all of your merchandise kept either in yo
showroom or in your safe? A. No, sir.

Q. Where else was the merchandise kept? A. The bu
of our merchandise was kept in a stockroom continui
from the showroom.

Q. How was that stockroom separated from the sho
room? A. There was a wall.

Q. Was that a floor-to-ceiling wall? A. Floor-to-ceili
wall, with a glass mirrored door facing the showroom.

Q. Could that door be closed? A. Definitely, sir.

Q. Could it be locked? (83) A. Definitely, sir.

Q. What type of business did you do from the
premises? A. Well, at 475 Fifth Avenue I started a sma
retail and Lay-Away Christmas Club Plan by laying awa
merchandise and people paying $1 a week so that the
would have merchandise at Christmas selected through

catalog, and I was doing this business continuously from 1942 until 1949.

Q. What sort of customers did you have on this lay-away plan? A. Retail customers, people who couldn't afford to pay all of the money at one time, wanted to lay away so they could have merchandise at their disposal when they needed it.

Q. Were all of your customers located in the City of New York. A. No, sir.

Q. Where were they located? A. Most of my customers were located in Pennsylvania where I had worked prior to that time.

Q. How were these people contacted? A. By person to person, by me going out and contacting them, showing them catalogs and their making (84) the selection, and being known through the territory for my type of merchandise and creating good will I had these people as my accounts.

Q. Were you the only salesman? A. I was until later on, and then I had one or two other salesmen, but I had collectors that used to collect and follow me after I made the sale.

Q. How many collectors did you have? A. I had two working for me in 475 Fifth Avenue.

Q. How often did they make these collections? A. Every week, sir.

Q. Did you have any other type of business that you ran? A. Yes, sir. Then it was getting hard for me, and so I thought I would expand and go into the credit — not credit but discount business, and so I moved to 44 East 29th Street and there I established this large loft, had it redecorated, neon signs in the front and a fairly elaborate place with a lot of new

ndise than was needed for the road, such as tele-
and radios and large silver set ware which was put
y new showroom. There I did a discount business
(85) people around the neighborhood, such as
s and New York Life and people who worked in the
gs that came up to our place for a discount on
ndise.

ill you describe this discount business a little more
What did that involve? A. Well, we would sell
d merchandise at a discount such as if a television
rth — sold retail for $150, I would allow 30 or 40
t off for the cash and give them the merchandise
ery. Watches that were retailed standard for $50,
uld save 50 per cent or 40 per cent on the sale to
d that was the way we did our discount business.
d you have any other trade names associated with
. I did, sir. We called the place the Gift Palace.

The Court: Gift what?
The Witness: Gift Palace.

you know a man named Morris H. Switzer? A. I

you see Mr. Switzer anywhere in the courtroom?
do.

Mr. Schwartz: May the record show the identifica-
n of the defendant Morris H. Switzer?
Mr. Stim: It is conceded Morris H. Switzer is

people who did not know me and I had bills to meet and I had gone to Mr. Switzer and explained that I needed some money.

Q. What did Mr. Switzer say to you? A. And he said that he could help me by getting me a person who would loan me some money.

Q. What, if anything, happened after that? (88) A. He then took me — Mr. Switzer took me to a man who — a man by the name of Mr. Goldberg, who was the owner of the Crown Factors.

Q. What was the Crown Factors? A. The man was a money lender to me. He loaned me money and he was in the office of Mr. Switzer.

Q. And do you recall where Mr. Switzer's office was at that time? A. I believe on Broadway, sir, 1447 — I am not sure exactly of the number.

Q. What, if any, role, what, if any, part did Mr. Switzer play? A. He was the one that got the loan for me, for he transacted business with Mr. Goldberg — for Mr. Goldberg and myself.

Q. Did he act in a professional capacity for either party? A. I believe so.

Q. For whom did he act? A. For both of us; for both Mr. Goldberg and myself.

Q. Did he represent both of you as lawyer? A. He did.

Q. How much was this loan?

(89)

The Court: Did you know that he was representing Goldberg?

The Witness: Yes, sir.

A. The first loan was $500.

Q. And were you required to pay interest on that loan? A. I was, sir.

Q. Do you recall what the interest was? A. To the best of my knowledge, I believe in paid — instead of getting the $500 I think I got $450. The exact amount I wouldn't remember.

Q. When was the loan payable? A. It was made for a month.

Q. Was this loan made to you personally or to your corporation? A. To the corporation, sir.

Q. Did there come a time after that when you had another conversation with Mr. Switzer? A. I did.

Q. When was that? A. I needed some more money and I had gone to Mr. Switzer and I had told him that I needed more money, and he said, "Well, I have another source for you now, that you will be able to get as much money as you need."

(501)

Q. And what was this other source? A. Mr. Switzer now was in a new office, and in this office there was a concern called the Bucknell Trading Company.

Q. What was the business of Bucknell Trading Company? A. To lend money to people.

Q. Do you know what the relationship was between Mr. Switzer and the Bucknell Trading Company? A. To my knowledge, I believe Mr. Switzer was a part owner of Bucknell and also the lawyer for Bucknell Trading.

Q. Who were the principals of the Bucknell Trading Corporation besides Mr. Switzer? A. A man by the name of Jack Shulman, who I dealt in business with.

Q. Did there come a time when you met Mr. Shulman? A. I did.

Q. Who introduced you to him? A. Mr. Switzer.

Q. And did you have a conversation with Mr. Shulman at that time? A. I did.

Q. Would you tell us what the conversation was? (91) What did you say and what did he say? A. Well, I explained to Mr. Shulman that I had expanded and I had bought merchandise and I needed money to pay these people because I was new to them, and the discount business was beginning and it was slow and I wasn't making much on my discount business and I needed money to tide me over, and Mr. Shulman then gave me money to carry me over.

Q. How much money? A. I believe the first time it was $2,000.

Q. Was this loan made to you personally or to your corporation? A. To the corporation, sir.

Q. Were you required to pay interest on the loan? A. I was, sir.

Q. Do you recall what that interest was? A. Well, I was to pay, I believe, $100 a month, something around there. I wouldn't exactly remember the figures.

Q. Do you remember what the interest was on an annual basis?

Mr. Stim: I object, your Honor, to that. He said $100. There isn't any testimony that it was supposed to be on an annual basis — to be paid on (92) an annual basis — here.

The Court: Overruled.

Mr. Stim: Exception.

Albert Faskow—for Government—By the Court

By the Court:

Q. At the time you arranged the loan did you arrange and agree upon a rate of interest or any other charge that you would pay to the lender for the use of his money? A. Yes, sir.

Q. And what was the amount of the charge? What was the amount of the interest? I believe it was 10 per cent.

Q. In other words, for $2,000 you were required to pay him $200? A. That's right.

Q. For how long a period? A. Until we reduced the amounts of my payments to him.

Q. Did there come a time when you paid back all of the money you borrowed from him? A. On some of the loans —

Q. No, on this one loan. A. Yes, sir.

Q. What was the total amount that you repaid for (93) the loan of the $2,000? A. Your Honor, it would be very hard for me to give you the figures because I had borrowed other money on top of this.

Q. All right. But you have been in business for some time and you have made loans from time to time, I assume? A. Yes.

Q. From banks and so on? A. Yes.

Q. Isn't it the custom when you borrow money for someone to say to you, "I will lend you so much at such a rate of interest"? A. Yes, sir.

Q. Was there any such practice discussed when you borrowed from Mr. Shulman? A. Yes.

Q. What were the terms of your arrangement? A. That I would pay 10 per cent on my unpaid balance.

Q. Ten per cent, annual rate of 10 per cent or monthly rate? A. Monthly, sir.

The Court: All right.

(94)

By Mr. Schwartz:

Q. What, if any, part did Mr. Switzer play in the negotiation of this loan? A. Mr. Switzer made up all the papers for this for me and for Bucknell, and, whenever I had payments, Mr. Switzer would come to my office and would collect the interest or the principal, whichever it might be, for the Bucknell Trading, and at times Mr. Shulman would come to my office and collect same.

Q. Was Mr. Switzer the attorney for Berkeley Jewelers, Inc.? A. Yes, sir.

Q. On this transaction? A. Yes, sir.

Q. Was he also generally the attorney for Berkeley Jewelers, Inc.? A. Yes, sir.

Q. Was he the attorney for the lender, Bucknell Trading Corporation, also? A. Yes, sir.

Q. You knew that at the time, did you not? A. Yes, sir. I did.

Q. Prior to the fall of 1948, did you borrow any money from anybody else? (95) A. Yes, sir.

Q. From whom did you borrow? A. Nat Shapiro.

Q. Who was Nat Shapiro? A. Nat Shapiro was a salesman for A. Cohen & Sons, with which I did quite a lot of business.

Q. A. Cohen & Sons were wholesalers of jewelry? A. They are wholesalers of jewelry.

Q. And how much money did you borrow from Mr. Shapiro? A. I borrowed $3,000.

Q. And can you tell us approximately when that was? A. I would say in the early fall or towards the latter part of the fall.

The Court: What year?

Albert Faskow—for Government—Direct

By Mr. Schwartz:

Q. Of what year? A. Of 1948.

Q. Did you speak to anyone other than Mr. Shapiro about this loan? A. Yes, sir.

Q. To whom did you speak about this loan? A. Mr. Switzer.

(96)

Q. What did you say to Mr. Switzer and what did Mr. Switzer say to you? A. I asked Mr. Switzer if I could get some more money and he said, "No, right now you can't. See if you can get some money somewhere else." So I told him I had borrowed from Mr. Shapiro $3,000 to tide me over.

Q. And what did he say? A. Well, that was all right.

The Court: Switzer did not have anything to do with the Shapiro loan?

The Witness: No, sir.

Q. Now, did there come a time after that Shapiro transaction when you spoke to Mr. Switzer again? A. I did. In the latter part of the fall, right before the Christmas rush——

Q. Of what year? A. Of 1948—I wanted to buy some more merchandise for the Christmas, because we expected a good Christmas. In that particular field Christmas usually is the time of the year that you make up for six months of the bad season, the bad time of the year, and I needed some money to pay my bills in order to be able to get more merchandise.

(97)

I at that time had gone to Mr. Switzer and told him that I need some money to carry me over the Christmas holidays, and so he said he had another outlet that he could get money for me.

Q. What, if anything, happened after that? A. He then took me to money lenders by the name of Jack Fellerman and Sam Mintz, who loaned me $2,000.

The Court: What is that first name? Jack what?

The Witness: Jack Fellerman and Sam Mintz.

By Mr. Schwartz:

Q. Where did this loan transaction with Fellerman and Mintz take place? A. It was transacted on Seventh Avenue in Mr. Mintz' office.

Q. Did they give you this $2,000 in cash or by check? A. Well, I made out a check to the name of Morris Switzer and they gave me $2,000. Morris Switzer then endorsed it and gave it to Mr. Fellerman and Mintz.

The Court: What was the amount of the check that you made to the name of Switzer?

The Witness: $2,000.

(98)

Mr. Schwartz: I ask that this be marked for identification.

(Marked Government's Exhibit 2 for identification.)

By Mr. Schwartz.

Q. Mr. Faskow, I show you Government's Exhibit 2 for identification and I ask you first whether that refreshes your recollection as to the amount of the check which you made out to the order of Morris H. Switzer and which Mr. Switzer endorsed? A. Yes, that includes the $2,000, plus $200 for monthly interest.

Q. How much is the amount of that check? A. $2,200.

Q. And I ask you what Government's Exhibit 2 for identification is? A. Well, this was the check that I made out to Morris Switzer for security, or, should I say, the loan that was given to me by Fellerman and Mintz.

Q. I call your attention to the writing on the back and ask you what that is? A. That is Morris Switzer's handwriting.

Q. That is his endorsement? A. That is his endorsement.

(99)

Mr. Schwartz: I offer in evidence Government's Exhibit 2 for identification.

Mr. Stim: No objection.

May I call your Honor's attention to the fact that this check is not cashed. It is just a check, blank, made out.

The Court: All right.

(Government's Exhibit 2 for identification received in evidence.)

By Mr. Schwartz:

Q. I call your attention, Mr. Faskow, to Government's Exhibit 2 in evidence and to the date October 31, 1948.

which appears on that. Do you recall whether that check was dated at the time? A. No, sir, the check was blank. There was no date put on the check.

Q. At the time that you made it out — A. It was a blank check with no date on it.

The Court: You mean it was blank as to date, otherwise it was filled out as it is now.

The Witness: Yes, it was blank as to date.

Q. Now, on this $2,000 loan —

The Court: Just a moment. Let me see Exhibit 2. Does it now bear a date?

(100)

Mr. Schwartz: Yes, sir.

Mr. Stim: A little pencil mark date, your Honor.

(Government's Exhibit 2 handed to Court by Mr. Schwartz.)

The Court: All right.

By Mr. Schwartz:

Q. Was there any agreement sir, as to interest on this loan transaction with Mr. Mintz and Mr. Fellerman? A. Yes, sir. I was to pay 10 per cent a month for that loan.

Q. $200 every month? A. Yes, sir. They would call or I should send them either cash or a check for the amount.

Q. Was there any period of time within which that loan was to be paid? A. No. It was blank. As long as I paid the interest I could keep the loan as long as I wanted, as long as the interest was paid.

Q. Did there come a time when you had a further conversation with Mr. Switzer about money? A. I did.

Q. When was that, sir? (101) A. After Christmas, I believe, of the same year.

Q. Is that Christmas of 1948, sir? A. That is right, sir.

Q. And what did you say to Mr. Switzer and what did Mr. Switzer say to you at that time? A. Well, the Christmas rush wasn't as well as expected. I was new in the field. And we tried to get business and we gave a little bigger discounts —

The Court: There came a time when you had a conversation.

A. (Continuing) And so in this conversation I explained to Mr. Switzer that the Christmas business wasn't as good as it was supposed to be and therefore I needed some more money.

Q. What did he tell you? A. He said he could get me some more money.

Q. What, if anything, happened after that? A. He then took me to arrange with Mr. Fellerman and Mintz for a further loan.

Q. A loan of how much? A. Another $2,000 — $1,000 one time, $1,000 another — $2,000 in $1,000 checks. It made a total of $4,000 that I would owe them.

The Court: You got an additional $2,000 in (102) the form of two checks for $1,000 each?

The Witness: $1,000 apiece.

By Mr. Schwartz:

Q. Now, did you receive this money, incidentally, in cash or by check? A. All this money was given to me in cash.

Q. And how much cash was given to you by Mr. Mintz and Mr. Fellerman on this occasion? A. In the first case, $2,000.

Q. And in the second case? A. $1,000 and $1,000.

The Court: I am not quite clear on that. You said you got checks.

The Witness: I gave them two checks for $1,000 each.

The Court: And you got in turn $2,000 in cash?

The Witness: In cash.

The Court: Very well.

Q. Was there any agreement as to interest on this second transaction? A. Yes, sir. It was to be 10 per cent a month, the same as my first loan.

Mr. Schwartz: I ask that these two checks (103) be marked for identification as one exhibit.

The Court: Were these two checks dated or undated?

The Witness: Undated, I believe.

(Marked Government's Exhibit 3 for identification.)

By Mr. Schwartz

Q. Mr. Faskow, what, if any, evidence of this indebtedness did you give to Mr. Mintz and Mr. Fellerman? A. Well, I had given one time some watches as collateral.

Q. I beg your pardon, sir. You don't seem to understand my question.

Albert Faskow—for Government—By the Court

The Court: Let me put it to him this way:

By the Court:

Q. At the time that you made any of these loan arrangements that you say you made through Mr. Switzer, did you sign any paper or any document? A. No, sir.

Q. Any agreement, any promissory note or anything of that kind? A. No, sir.

(104)

Q. In other words, the only memorandum that passed between you was your undated check which you gave? A. That is right.

The Court: Very well.

By Mr. Schwartz:

Q. I show you Government's Exhibit 3 for identification and I ask you whether that refreshes your recollection as to the amounts of these checks that you gave to Mintz and Fellerman? A. That is exactly right. He gave me $1,000 and I made out two checks for $1,100 each, which was 10 per cent for monthly interest on the checks.

Q. Do I understand you to say that he gave you only $1,000, or was it $1,000 on two separate occasions? A. $1,000 on two separate occasions.

Q. And on each of those occasions you gave him one of these checks? A. I did, sir.

Q. Does this Exhibit 3 for identification you have refresh your recollection as to how these checks were made out? A. Yes, sir, they were made out to Morris Switzer for $1,100 and I received from Fellerman and (105) Mintz $1,000 on each check.

Q. I call your attention to the writing on the back

and ask you what that is? A. That is an endorsement by Morris Switzer.

Q. Does that appear on each of these two checks? A. It does, sir.

Mr. Schwartz: I offer in evidence Government's Exhibit 3 for identification, consisting of two checks.

Mr. Stim: Your Honor, may I find out from the district attorney in whose handwriting these checks were made out?

Mr. Schwartz: Sure.

By Mr. Schwartz:

Q. Do you know, Mr. Faskow, in whose handwriting the body of this check is written? A. Yes.

Q. Whose handwriting? A. That is my handwriting.

Q. That is your handwriting? A. That is right.

Mr. Stim: Both of them?

The Witness: Both of them. Not on the other check.

(106)

Mr. Stim: I am talking about the two $1,100 checks.

By Mr. Schwartz:

Q. How about this $2,200 check? A. This is Mr. Switzer's handwriting.

By the Court:

Q. When you say "this," you mean on Government's Exhibit 2?

Mr. Schwartz: Government's Exhibit 2.

Albert Faskow—for Government—By the Court

Q. The face of Government's Exhibit 2 is in Mr. Switzer's handwriting? A. Right.

Q. And the face of Government's Exhibit 3 is in your handwriting? A. Yes.

Mr. Stim: No objection.

By Mr. Schwartz:

Q. The dates which appear on these two checks, were they on there at the time that you gave them? A. No, sir.

Mr. Schwartz: May I have this marked in evidence?

(Government's Exhibit 3 for identification received in evidence.)

(107)

Mr. Stim: Your Honor, I didn't understand. Did the witness testify that, when he had a conversation with Fellerman and Mintz on the second occasion, Switzer was there?

The Witness: Switzer was there on both occasions.

By Mr. Schwartz:

Q. Mr. Faskow, did you ever pay the $4,000 represented by these checks? A. No, sir.

Q. Did you pay any interest on these loans? A. Continued paying interest every month.

Q. That is, between when and when? A. From 1948 to 1949.

Q. What time in 1949? A. Until December of 1949.

The Court: Pardon me just a moment. Let me see Government's Exhibit 3, please.

(Handed to Court.)

By the Court:

Q. You say these two checks which are now marked Government's Exhibit 3 in evidence were given some time after Christmas in 1948? A. To the best of my knowledge, I believe so.

(108)

By Mr. Schwartz:

Q. At what rate did you pay interest on these loans?

Mr. Stim: Your Honor, we already have that.

The Court: Didn't he just say that the charge was 10 per cent a month?

The Witness: Ten per cent a month.

The Court: And that he paid it each month?

The Witness: That is right.

Mr. Schwartz: Very well, your Honor.

Q. Will you tell us how these interest payments were made? A. Well, every week they would come to me —

Q. "They" is who? A. Mr. Switzer or Mr. Mintz — and would tell me that I would have — make sure I have the money for the loan, and it was broken up every second week, because I paid $200 every second week on the loans. In other words, at the end of the month I had paid $400 for my interest on the $4,000.

Q. Did you pay be check or by cash? A. I paid both by cash and by check. Many times Mr. Mintz would come up

and want the cash and he knew that my collections would come in on a Satur- (109) day, so he would come up and get cash, but many times I paid by check.

Q. And to whom — what individuals — did you make these payments? A. Well, I made them to Mr. Mintz and Mr. Fellerman.

Mr. Schwartz: I ask that these checks be marked for identification as one exhibit.

(Marked Government's Exhibit 4 for identification.)

By Mr. Schwartz:

Q. Mr. Faskow, I show you Government's Exhibit 4 for identification and I ask you what those checks comprising that exhibit are (handing to witness)? A. These are checks for interest paid on my loan.

The Court: How many checks are there?

The Clerk: Six, sir.

The Court: All right.

Mr. Schwartz: I offer Government's Exhibit 4 in evidence.

Mr. Stim: No objection.

(Government's Exhibit 4 for identification received in evidence.)

(110)

Mr. Schwartz: Ladies and gentlemen, these are checks for $200 each. There are six of them. Each of them is payable to cash. They are dated variously between September 26, 1949, and Decem-

ber — I beg your pardon — and November, 1949. The earliest is August 12, 1949, —

The Court: What?

Mr. Schwartz: The earliest is August 12, 1949 — and the latest is November 9, 1949.

They are checks of Berkeley Jewelers, Inc., by Albert Faskow, President.

Mr. Stim: What?

Mr. Schwartz: Berkeley Jewelers, Inc., by Albert Faskow, President.

The Court: Each check is in the amount of $200.

Mr. Schwartz: May I have these checks marked for identification as one exhibit, please?

(Marked Government's Exhibit 5 for identification.)

By Mr. Schwartz:

Q. Mr. Faskow, I show you Government's Exhibit 5 for identification consisting of seven checks in amounts as follows: $275, $275, $175, $175, $175, (111) $275 and $325. These checks are dated as follows: October 7, 1949, October 14, 1949, December 12, 1949, December 27, 1949, January 13, 1950, October 21, 1949, and October 28, 1949.

They are checks of Berkeley Jewelers, Inc., by Albert Faskow, President.

I ask you what those checks are, sir (handing to witness)? A. These checks were given to Fellerman and Mintz for interest on my loans.

Q. Is that these loans totaling $4,000? A. That is right, sir. Some of these checks were not all checks. Part of it was checks and part was cash. I didn't have enough cash

so he would ask for the difference in a check plus the cash, and that is how these are irregular.

By the Court:

Q. In other words, you told us before that your arrangement was that you would pay $400 each month? A. That is right, sir.

Q. What you are saying now is that each time you gave one of those checks, the difference between the amount of the check and $400 you made up in cash? (112) A. I would give him in cash. On many occasions, your Honor, I would give him cash without giving him a check because there was no money in the bank to give him a check.

Q. But is it your testimony that each month you made a total of $400 in payment, whether you did it by check or cash or check and cash? A. I did.

Mr. Schwartz: I offer in evidence Government's Exhibit 5 for identification.

Mr Stim: No objection.

(Government's Exhibit 5 for identification received in evidence.)

By Mr. Schwartz:

Q. I believe you have testified that your Christmas business in 1948 was not good. A. No, sir.

Q. Would you tell us what the state of your business was during the early part of 1949? A. My business was very slow in the discount business. The only profitable business that I had was my business out of town on my

lay-away plan, and we did very little business in the early part of 1949.

(113)

The Court: In which branch?

The Witness: In the discount business.

Q. Were you able to meet all your obligations as they came due at that time? A. I could not, sir.

Q. Did you speak to anyone about that? A. Well, I talked to Mr. Switzer.

Q. When did you speak to Mr. Switzer? A. After the Christmas in the early part of 1949.

Q. What did you say to Mr. Switzer and what did Mr. Switzer say to you? A. Well, that I needed more money to pay these bills to my creditors because I wanted to carry on. I felt that as time went along my name would be known amongst the people that I sold merchandise to and my discount business would be come better so that I could carry on in the discount business.

Q. What did Mr. Switzer tell you? A. He told me not to worry, that he felt at this time he could get me some more money.

Q. Did he get you some more money? A. He did, sir.

Q. From what sources did he get you some more money? (114) A. Through the Bucknell Trading Company.

Q. And that is Jack Shulman? A. That is Jack Shulman.

Q. And did you thereafter borrow money from this company? A. I did, sir.

Q. Can you give us an idea how much more money you

borrowed? A. Well, during that year, to the end of the year —

Q. What year are you talking about? A. I am talking about in 1949, sir. That I had borrowed up until the latter part of 1949 about $17,000.

Q. From the Bucknell Trading Corporation? A. From Bucknell Trading.

Q. Did you borrow from any other source at that time? A. I did.

Q. What other sources? A. Well, I had borrowed from sources through Mr. Switzer that I had paid back, such as the Peerless Company, who he sent me to, and the Plymouth Factoring Company. They gave me money and I gave them collateral (115) and then I paid them back their money.

Q. Any other sources? A. That is all I can remember, sir.

Q. Did you borrow money from a man named Bernard Kwartin in 1949? A. Yes, I did. Through Bucknell — Mr. Kwartin is an uncle, to the best of my recollection, to Mr. Shulman, and through Mr. Shulman I got the Kwartin loan and I gave a substantial amount of merchandise -

Mr. Stim: I object, your Honor, to any transaction with this — is it Kwartin?

The Court: You claim Mr. Switzer was involved in this?

Mr. Schwartz: Yes, sir.

The Witness: Yes, sir.

Mr. Stim: Can we have the date and so forth?

Mr. Schwartz: Yes, surely.

By Mr. Schwartz:

Q. To the best of your recollection, Mr. Faskow, when did this Kwartin loan take place? A. In the latter part of 1949.

Q. Who introduced you to Mr. Kwartin? A. Mr. Switzer and Mr. Shulman.

(116)

Q. How much was the Kwartin loan? A. $3,000.

Q. What was the interest on the Kawartin loan? A. Offhand I wouldn't remember, sir. It would be hard for me to know because we were to pay it in monthly installments.

Q. Can you approximate on a percentage basis what this interest would be? A. Well, the Kwartin loan was not similar to the Bucknell loan. It was less of an interest because I gave collateral for it.

Q. Very well. Did Mr. Switzer play any part in these further loans from the Bucknell Trading Corporation? A. Yes, sir.

Q. What part did he play? A. He always negotiated the loan. In my opinion, he was the lawyer both for me and for Bucknell and wrote up the papers for Kwartin.

Q. And you knew that at the time? A. Oh, yes, sir.

Q. Was that also true with respect to the Kwartin transaction? A. Yes, sir.

(117)

Q. Did you borrow any more money from the Crown Factors? A. I did, sir, during the year 1949.

Q. How did that come about? A. Well, that I went directly to Mr. Goldberg by myself and I gave Mr. Gold-

berg collateral and he borrowed me money and that was paid on a monthly basis—

Mr. Stim: He said "he borrowed"; he loaned money.

A. I borrowed.

Mr. Schwartz: Mr. Faskow borrowed from Mr. Goldberg.

Mr. Stim: At this point I move to strike any testimony as to the last transaction, because he said he went himself to that concern. Mr. Switzer had no part in it at all.

The Court: Overruled.

Mr. Stim: I withdraw my objection.

The Court: Objection withdrawn. Go ahead.

By Mr. Schwartz:

Q. Let me focus your attention on the month of December, 1949, Mr. Faskow. Can you give the ladies and gentlemen of the jury an approximation of the (118) amount that your corporation owed at that time to the Bucknell Trading Corporation?

The Court: Did you fix a date? If you did, I didn't hear it.

Mr. Schwartz: The month of December, 1949.

A. To the best of my recollection, it was around $20,000, including the Kwartin loan.

Q. And at that time were you still indebted to Mr. Mintz and Mr. Fellerman? A. Oh, yes.

Q. To what extent? A. $4,000.

The Court: That is not included in the $20,000?

The Witness: No, sir, that is not. That is separate.

By Mr. Schwartz:

Q. At that time were you still indebted to the Crown Factors? A. Yes, sir.

Q. And can you give us an approximation of the amount that was owing to them? A. About $2,000. I am not sure of the figures.

The Court: That also is in addition to the (119) $20,000?

The Witness: That is right.

By Mr. Schwartz:

Q. On the Bucknell loans, how were payments made on those loans? A. Well, every week either Mr. Shulman or Mr. Switzer would come into my office or I would go to their office and pay them by check or by cash. In many instances they would want cash. So I would take a check, make a check out for whatever amount of interest they had asked me for — in fact, I was paying them whatever interest they wanted. Certain weeks I would give them $200, some weeks $300. It depended upon how much money I had — and I would — Mr. Switzer would take me down to a cash — where they cashed checks, and he would say he needed the cash, so I would cash a check and give him the cash; and sometimes the check would be made out for

a little more and I would keep part of the cash and give him the balance of the cash.

Mr. Schwartz: May I have these checks marked for identification as one exhibit?

The Clerk: Shall I count them, counsellor?

Mr. Schwartz: Yes, if you would. There (120) are about 20-some-odd.

The Court: How many checks are in that batch, Mr. Schwartz?

Mr. Schwartz: I haven't counted them. I believe the clerk is counting them now.

The Court: Suppose we take our midmorning recess here now and go on with this exhibit when we return.

(Short recess.)

(Jury in box.)

(Marked Government's Exhibit 6 for identification — 48 checks.)

By Mr. Schwartz:

Q. Mr. Faskow, I show you Government's Exhibit 6 for identification consisting of 48 checks. I ask you to examine them —

Mr. Stim: How many checks?

Mr. Schwartz: Forty-eight, Mr. Stim.

Q. I ask you to examine those checks and I ask you what they are (handing to witness)?

Mr. Schwartz: Mark these for identification as a separate exhibit, please.

(Marked Government's Exhibit 7 for identification — three checks.)

(121)

Q. Those are all checks of the Berkeley Jewelers, Inc., by Albert Faskow, President, are they not? A. Yes.

Q. What are those checks? A. Those checks are loans made from Bucknell Trading and interest payments to the Bucknell Trading but paid to Mr. Switzer.

The Court: Just a moment. You say loans made by Bucknell?

The Witness: From me, from Bucknell Trading.

The Court: Do any of them represent a loan you made?

The Witness: Yes, sir, loans I made from Bucknell Trading.

The Court: You weren't lending the money, you were borrowing the money.

The Witness: Loaned the money.

Mr. Stim: He got cash for it.

Mr. Schwartz: You are not testifying, Mr. Stim.

The Witness: These checks that you have there, Mr. Schwartz, are in payment for moneys that I received from the Bucknell Trading and also interest that I paid to Bucknell Trading, all made out to Morris Switzer.

(122)

Q. To whom did you pay these checks? A. To Morris Switzer.

Q. You examined all of these checks? A. I have.

Mr. Stim: May I respectfully object to that question, to whom did he pay the checks? Does he mean to whom he delivered the checks? That calls for a conclusion.

Mr. Schwartz: I would be glad to clarify that Mr. Stim.

Q. To whom did you deliver these checks? A. To Mr. Switzer.

Q. Did Mr. Switzer endorse each of these checks? A. Yes, sir.

Q. I call your attention to various further endorsements on these checks, "Max Stark." Can you tell us how that endorsement came to be on that check? A I believe Mr. Stark cashes checks and I took this check and had it cashed and gave Mr. Switzer the cash and I kept maybe some of this cash. I wouldn't know exactly how much. But I would give him the balance in cash.

Mr. Stim: In view of that, your Honor, may I move to strike out the answer. Now it appears (123) that some of the money from these checks went back to him.

The Court: I don't know what part you want stricken out. Do you want that part stricken out? Isn't the testimony clear the witness says that in each instance these checks were delivered, physically delivered to Switzer?

Mr. Stim: That is correct.

The Court: That in some instances they were taken to a check casher by the name of Stark. The cash was received from Stark and some of the cash was given to Switzer and some of the cash was kept by the witness.

Mr. Stim: Very well.
The Court: It seems to me that is clear.
Mr. Stim: Very well, your Honor.

By Mr. Schwartz:

Q. Was anyone with you when you went to these check cashing places? A. No, sir, only Mr. Switzer.

By the Court:

Q. Then there was someone with you? A. I mean, outside of Mr. Switzer. I am sorry.

Q. Is it your testimony that on each occasion (124) when you took one of these checks and brought it to a check casher to have it cashed Mr. Switzer accompanied you? A. Yes, sir, because every one of them was endorsed by Mr. Switzer.

The Court: Very well.

By Mr. Schwartz:

Q. Was Mr. Stark the only check casher? A. No, sir. There were a few others.

Q. Do you recall the names of any of the others? A. I believe Kramer, Royal—I don't remember the names—Katz—I believe there was a Katz.

Q. Kramer, Royal and Katz; is that right, sir? A. I believe that would be the names. It is very vague in my mind.

By the Court:

Q. Was it the practice that each time you delivered one of these checks you went to a check casher and cashed

it? A. No, not always. Sometimes I gave him this check and that was the end of it. Sometimes he needed the cash. He said, "Don't you have cash?"

I said, "No, I don't have cash."

I said, "I will give you a check and take (125) you down and cash the check." And that is what happened.

The Court: Very well.

By Mr. Schwartz:

Q. I call your attention to a check No. 3671 dated November 3, 1918, and ask you whether that refreshes your recollection as to any other check casher? A. Yes, sir.

Q. What was— A. It was a trading company.

Q. What was the name of that trading company? A. Superior Trading Company.

Mr. Schwartz: I offer in evidence Government's Exhibit 6 for identification.

The Court: While counsel is going on with this, ladies and gentlemen, I will tell you that we will have to recess this afternoon at 4 o'clock also. I hope that won't inconvenience you. There is a meeting of the Board of Judges at that time this afternoon. I hope the weather stays nice.

Mr. Stim, let me make this suggestion. It is not the practice of Mr. Schwartz to hand each check right to the jury to examine them, and I wonder if we could save time by letting them come in and then (126) whatever notations you wish to make, if you are going to make notations, you could borrow the exhibit.

Mr. Stim: Your Honor, I just want to verify some of these endorsements.

The Court: Yes, of course, you can do that, but instead of taking the time now to make any notations that you wish to make with respect to them, you could do it later.

Mr. Stim: I may object to some of these checks.

The Court: I know you have to go through them now. I guess I didn't make myself very clear.

Mr. Stim: Your Honor, I have no objection to all of the checks here offered in evidence except check No. 5068, dated August 15, 1949, payable to the order of Albert Faskow in the sum of $1,200, endorsed "Albert Faskow," and then somebody signed the name of "Morris Switzer," which is not in the handwriting of the defendant. The defendant has no recollection of ever authorizing anyone to sign his name to it, and I think you may ask this witness whether that is his signature.

By Mr. Schwartz:

Q. In order that that objection be cleared up, (127) I call your attention to the words "Morris Switzer" appearing on the back of check No. 5068. Do you recognize that as the handwriting of Morris Switzer? A. The "Morris" is but not the "Switzer."

Mr. Schwartz: I will withdraw this check.

Mr. Stim: Would your Honor have this check marked for identification, please.

The Clerk: Are you offering it, Mr. Stim?

Mr. Stim: Yes.

The Court: Just a moment, please.

Albert Faskow—for Government—Direct

Exhibit No. 6 consists of 47 checks as to which there is no objection.

(Government's Exhibit 6 for identification received in evidence.)

The Court: Now you want to have this check marked for identification. Let us see what it is. This is a check of the Berkeley Jewelers, Inc., dated August 15, 1949, in the amount of $1,200. The number of the check is 5068, which will be marked as Defendant's Exhibit A for identification.

(Marked Defendant's Exhibit A for identification.)

Mr. Schwartz: Does your Honor wish to see this exhibit again, the checks?

(128)

The Court: No.

By Mr. Schwartz:

Q. Mr. Faskow, I show you Government's Exhibit 7 for identification and call your attention particularly to the endorsement on these three checks comprising this exhibit (handing to witness).

What are those checks, Mr. Faskow? A. Well, these are checks that Mr. Switzer—I had asked him, I needed some cash immediately——

Q. When was this? A. During the fall of 1949—and I needed a few hundred dollars.

He said, "Well, I can get you a few hundred dollars

from my mother-in-law for a week or two, but, of course, it is going to cost you for her trouble."

So I would make out a check and he would take me to Brooklyn and cash the check in his mother-in-law's account and then would give me some cash for the amount that I wrote out. I don't remember exactly how much it was, whether it was $25 for a week or two weeks dated ahead.

Q. How much was the loan? A. $200. Like here I had $270. $250 probably I would get and $20 went to his mother-in-law, and I (129) believe Pauline Fuchs is his mother-in-law.

Q. How far in advance did you date these checks? A. About a week. The latest would be two weeks. I wouldn't remember exactly.

Q. So that, for example, on the check dated October 20, 1949, No. 5085, for $270, is it your testimony that that represents a loan arranged through Mr. Switzer for $250? A. Well, yes, a loan.

Q. And that the additional $20 represented interest on that loan of $250 for a period of approximately two weeks? A. That is right.

Mr. Schwartz: I offer in evidence Government's Exhibit 7 for identification.

Mr. Stim: No objection.

(Government's Exhibit 7 for identification received in evidence.)

By Mr. Schwartz:

Q. Was there ever a time, Mr. Faskow, when you paid Mr. Switzer any fees for his services in connection with

these various loans? A. Well, in some of these checks, amongst them checks were checks personally paid to Mr. Switzer for (130) transactions through for the loan he was getting from Bucknell for me.

Q. Is there any way you have of identifying which particular checks are involved? A. I couldn't identify them, sir.

Q. Could you tell us approximately how much you paid to him in fees for negotiating these transactions? A. No, sir, I couldn't. It was over that period of time and he would come and say, "You give me $200 or $250 and that will be towards the loan and part of it is for a fee." So it would be hard for me to distinguish which is which.

Q. Did any of the money lenders represented by Mr. Switzer receive any collateral on any of these loans, any collateral security? A. Yes, sir.

Q. Which of the money lenders? A. Kwartin was one of them that had received it. Mr. Jack Shulman received some collateral and Fellerman and Mintz also received some collateral.

Q. Did there come a time when you spoke to Mr. Switzer about this collateral? A. I did. In the fall of the year.

Q. What did this collateral consist of?

(131)

Mr. Stim: Fall of what year?

By Mr. Schwartz:

Q. Fall of what year? A. Fall of 1949.

Q. What did that collateral consist of? A. It was merchandise like watches and pins and earrings and merchandise I could sell for the Christmas holidays. It was

merchandise that wouldn't move only around Christmas.

Q. What did you say to Mr. Switzer about that and what did Mr. Switzer say to you? A. I had asked Mr. Switzer that he try and get this merchandise back so that I could put it on the shelves and sell it, so that I can get some money and be able to carry on and pay off some of these bills.

He said, "Well, you don't need that. You get fresh merchandise from your creditors and these people here want this as collateral," and I didn't get the merchandise but had to buy new merchandise and this collateral was left with these individual people.

The Court: Shulman, you say, was one of those?

The Witness: Yes; Jack Shulman and Kwartin.

(132)

By Mr. Schwartz:

Q. Did you thereafter buy fresh merchandise? A. I did, sir.

Q. And was that for the Christmas business that you anticipated in 1949? A. That is right, sir.

Q. In the month of December, 1949——

Mr. Schwartz: I withdraw that.

Q. Who was your primary supplier? Who were your suppliers for this merchandise that you bought? A. Well my biggest supplier in merchandise was A. Cohen & Sons.

Q. A. Cohen? A. A. Cohen & Sons.

Q. And the business of A. Cohen & Sons is— A. Wholesale jewelers.

Q. With whom in A. Cohen & Sons did you deal? A. I dealt through Mr. Nat Shapiro.

Q. Did you keep all of the merchandise that you purchased through A. Cohen & Sons? A. Mr. Nat Shapiro would send me up merchandise and, being Christmas, he would be able to send me merchandise, and then he would come up and take part of this merchandise back and sell it to somebody (133) else who couldn't get the merchandise and then tell me, well, that I couldn't get the same amount for the merchandise; that I would have to take a loss. So he would ship me the merchandise and then take back some of the merchandise and pay me in cash whatever he could for the merchandise that he sold.

In other words, I would buy it from A. Cohen & Sons. He in turn would, through him—he would ship it to me, then he would come and take it away from me and take it somewhere else and give me cash, but I would lose sometimes 10 per cent or 15 per cent of the actual cost without even using the merchandise.

Q. Why was it necessary——

Mr. Stim: I object to that, your Honor, asking why. Is it asking for a conclusion.

The Court: Mr. Stim, if you will wait until he finishes the question I will be able to rule a little better on the question, but I know of no rule of law that prohibits somebody from asking why.

Go ahead. Don't answer this question until Mr. Stim has an opportunity to object, if he wishes.

The Witness: Yes, sir.

Q. Mr. Faskow, I ask you why you entered into (134) this arrangement with Mr. Shapiro with respect to merchandise?

Mr. Stim: I object to that. There is no such testimony that he made an arrangement, and furthermore we are not bound by any arrangement that he made with Mr. Shapiro, who concededly is not an agent of the defendant Switzer.

The Court: I am inclined to think that may be so, Mr. Schwartz.

Mr. Schwartz: I withdraw the question. I will clear that up.

Q. Did you speak to anyone other than Mr. Shapiro about this arrangement with respect to merchandise from A. Cohen & Sons? Did you speak to anyone other than Mr. Shapiro about it? A. Yes, sir; Mr. Switzer.

Q. What did you tell Mr. Switzer and what did Mr. Switzer say to you? A. I told him that Mr. Shapiro would be able to get me some money and that the way he did it was by him sending me merchandise and then selling this merchandise. I would then get money so I could pay some of the loans outstanding to the different people I had borrowed money from because they were pressing (135) me.

Q. What did Mr. Switzer say. A. He had no objection to what I was doing.

By the Court:

Q. Let me see if I get this clear. You would order merchandise from A. Cohen & Sons? A. That is right.

Q. And just by way of example, let us assume that you ordered a thousand watches. A. That is right, sir.

Q. I understand that the arrangement that you had was that, after those watches had been delivered by Cohen through Shapiro,— A. Yes, sir.

Albert Faskow—for Government—By the Court

Q. —Shapiro would then come and he might take, say, 200 of those watches? A. That is right, sir.

Q. Which he would sell? A. That's right, sir.

Q. When he sold those did he turn over the purchase price or the sale price to you? A. No. He would tell me that he couldn't sell it for the price, that that particular merchandise was hard and so he had to sell it for less than the (136) cost.

Q. All right. Assume that the value of the watches was $10. Instead of turning back to you $2,000, would he turn back something less? A. Yes.

Q. And that, he would say, represented what he got for it? A. That is right, sir.

Q. In addition to that, did he charge you for his selling service? A. No, sir.

The Court: I see. Very well.

By Mr. Schwartz:

Q. You say this occurred during the Christmas season of 1949? A. Right, sir.

Q. Would you tell the members of the jury what the financial condition of Berkeley Jewelers, Inc. was during that time, the Christmas season of 1949? A. Well, the people that I loaned money from were pressing me. They all waited for the Christmas rush. The thing wasn't going as we had expected—I had expected.

The Court: That is at least the understatement (137) of the year.

A. And I didn't know——

The Court: I withdraw that, ladies and gentlemen. I probably should not make any such comment.

A. I didn't know what to do. I was in a state of, should I say, actually feeling that any minute they would all come in on me and throw me into bankruptcy and I had no thought of what was going to happen to me, depending upon the season.

By the Court:

Q. It comes to this, that at the Christmas season of 1949 you were on the verge of bankruptcy? A. Yes, sir.

Q. And you were then unable to meet your payments as they came due? A. That is true, sir.

By Mr. Schwartz:

Q. Mr. Faskow, I show you Government's Exhibit 1F in evidence, which are schedules in bankruptcy. I call your attention to the signature appearing on the bottom of each of these pages. Do you recognize that signature? A. Yes, sir. That is my signature.

(138)

Q. Now, I call your attention to the list of creditors and the amounts owing to them set forth in this schedule. First, the creditors holding security. Were all of the amounts set forth on that page owed to these people prior to December 15, 1949? A. I believe that is true.

Q. I call your attention also to the list of general or unsecured creditors, mostly merchandise creditors, totaling $104,476.88, and I ask you whether all of these amounts

were owing to these people prior to December 15, 1949? A. I believe that would be right.

The Court: What is the amount of the secured?

Mr. Schwartz: The amount of the secured indebtedness is set forth here in the schedule signed by you at $28,500.

Q. Is that right? A. Yes, sir.

The Court: And the unsecured?

Mr. Schwartz: $104,476.88.

Q. At that time did you have any assets other than your inventory? A. Yes, sir.

Q. I am talking about the corporation now. Did (139) the corporation have any other assets than its inventory? A. No, sir.

Q. Except, of course, the stock. A. The stock. I meant stock and fixtures and my lay-away business.

The Court: What?

The Witness: My lay-away business, which was still running.

The Court: Is that an asset? Were there funds that you collected under the lay-away plan segregated in a separate bank account?

The Witness: No. They were in the same bank account.

By Mr. Schwartz:

Q. I call your attention to the summary of debts and

assets in this Exhibit 1F in evidence bearing your signature——

Mr. Stim: Your Honor, is counsel referring to the financial condition at the time of the filing of the petition in bankruptcy or is he referring to December, 1949?

Mr. Schwartz: Mr. Stim, I have asked this gentleman if this was his condition before Decem- (140) ber 15, 1949.

Mr. Stim: Then I object, your Honor, to questions or references to these records because that is the condition as of the date of the filing of the Petition in bankruptcy in February of 1950.

The Court: Overruled.

Go on.

Mr. Stim: Exception.

The Court: I don't get what your point is. He asked him what the condition was in December. He is now showing him these schedules which contain a detailed record. As I understand it, the question is do those papers there represent substantially what the condition of the business was in December. I understand him to say it was. The fact that the schedules were written in February does not change the situation any.

He is allowed to refer to that and the witness is now telling us what these schedules written in February, 1950, show is the condition that obtained in December, 1949. You may cross examine him about that at an appropriate time, and I assume you will.

Mr. Stim: Very well.

Albert Foskow—for Government—Direct

(141)

By Mr. Schwartz:

Q. Does this summary of debts and assets set forth in this schedule fairly state the condition of your business as of December 15, 1949? A. Yes, sir.

Mr. Schwartz: Ladies and gentlemen of the jury, I will read the summary there. It shows total assets, $28,500; total debts, $133,276.88.

At this time, if your Honor please, I respectfully request permission of the Court to show to the jury the checks which had been introduced in evidence through this witness.

The Court: You may do so.

Mr. Schwartz: I will also show them, if your Honor please, Government's Exhibit 1F in evidence (handing to jury).

The Court: Mr. Schwartz, let me make a suggestion to you. Take these exhibits and suppose you hand each one to the foreman first and let him pass them along. Let him look at the first one you put in and he can pass them along.

Mr. Stim: Your Honor, may I respectfully ask the Court at this time to instruct the injury that the interest payments, whatever they may be, are (142) not the charge or the violation of law which is being prosecuted here, but that in itself is not a violation.

The Court: You want me to say to the jury that the testimony that the man exacted, if the jury believes he did exact, interest over and above the legal rate is not any part of the charge made against this defendant?

Mr. Stim: That there is no such thing as a legal

rate of 6 per cent chargeable to corporations and that, if payment of interest by a corporation to a lender is a part of an agreement, if it is agreed by both parties, it is not in violation of any law. It must not be used by the jury to influence them in evaluating the crime charged in this indictment.

The Court: I do not think I will give them those instructions now. If it gets to the point that it is submitted to the jury I suppose you will give me a request covering that point and I will consider it at that time.

Mr. Stim: Very well.

The Court: But certainly the charge here is what the indictment states and is not something else.

Mr. Stim: That is right.

(143)

I wonder if your Honor could permit the defendant to leave the room for about two minutes.

The Court: Yes.

(Defendant leaves courtroom.)

The Court: Is the jury finished?

Mr. Schwartz: Yes, but the defendant is not here.

The Court: May we go ahead or do you insist on him being here?

Mr. Stim: He will be here any minute now.

The Court: Can we go ahead before he gets here or do you insist on him being here? Can we go ahead now or do you insist on him being here?

Mr. Stim: I do not insist on anything, your Honor. It is perfectly all right.

The Court: Go ahead.

By Mr. Schwartz:

Q. Was there a time in December, 1949, when you spoke to anyone about your financial condition? A. I did.

Q. To whom did you speak during that month? A. Mr. Switzer.

Q. What did you say to him and what did he say to you? (144) A. Well, about the middle of December, when I seen that our expectations were far from what it should have been, I said to Mr. Switzer that it was going to be very hard for me to pay all these interests on the notes because I had to pay $400 here and $400 there, and I didn't know where I was going to get the money. On top of that, my creditors would expect money from the Christmas business which I had been paying out to interest, et cetera, and I thought that I would have to give up and I didn't know what to do.

I asked for advice from him, being my lawyer. I said, "If I don't pull out of this the next thing is I will go into bankruptcy."

(Defendant returned to courtroom.)

Q. What did Mr. Switzer say? A. Mr. Switzer said, "Well, don't worry too much."

He said, "I think I have an idea that will be your saving, which will help you and you will clear yourself out without any worry, and let's wait until after the Christmas holidays and see what happens."

Q. Did there come a time when Mr. Switzer told you what his idea was? A. Yes.

(145)

Q. When was that, sir? A. That was after Christmas.

Q. And what did he tell you his idea was? A. Well, he said, "You know, you will have to go into bankruptcy but," he said, "this is what you will do. The most important people that I want to be taken care of is Bucknell and Fellerman and Mintz, and if you follow what I tell you everything will be all right, because you will wind up with your out-of-town business, you will form a new corporation which will be the new business, and I will arrange to have somebody be the president," which was his brother-in-law. He was bringing him down from Boston. He would make him the president of the company. I would be guaranteed to have a job to run this business which I had prior to the discount business, which I knew, and would break his brother-in-law in and show him how to do this and continue doing the old business which I did before I went into 44 East 29th Street, but——

Q. Did he tell you what would happen to the creditors? A. He said "The other creditors will all be wiped out and you won't have any headaches from nobody, (146) but we must pay off Bucknell and Fellerman and Mintz, and there will be enough merchandise left over after I have this arranged that you will be all right and you will have a job."

Q. Did he tell you how he proposed to accomplish all this? A. He did.

Q. What did he tell you? A. He said that I would have to sign four notes of confession of judgment to Fellerman and Mintz for the $4,000 that I owed them.

Q. When you say the $4,000 that you owed them, do you mean you personally? A. No, the corporation, Berkeley Jewelers, Inc., owed them $4,000.

Albert Faskow—for Government—Direct

The Court: This was Fellerman and Mintz?
The Witness: Fellerman and Mintz.

A. (Continuing) He in turn would get a lawyer, and he mentioned a man by the name of Chasin, a cousin of his, who would take these notes to the court and record them. Then he would get a marshal—he would bring this friend of his and the marshal to the place and this marshal would put the judgments in a conspicuous place in my office in the back, and (147) that he would get a custodian, a friend of his, who would see that—to take care of the merchandise, because they had to have a custodian, and I would have no more jurisdiction over the merchandise or the place. I would have to turn my key over to the custodian, and that, when they would have a sale at the end of the week, which would be Saturday morning, this marshal would make the sale and Fellerman and Mintz would buy all of my stock for approximately $1,500. My stock was worth much, much more. But that is the way it was to be arranged, and whoever would come in who might be outsiders that would want to bid, he said—Mr. Switzer said that he would take care of that, not to worry about them; that Fellerman and Mintz will definitely get the merchandise and that part of this merchandise he would sell so that he could get the money for Bucknell Trading and pay off Fellerman and Mintz and the balance of the merchandise would be set aside so that I can continue in the new corporation which was to be called Berkeley Pennsylvania.

Q. Who was supposed to be the president of Berkeley Pennsylvania Corporation? A. The president was supposed to be Mr. Irving Shear, who is a brother-in-law of Mr. Switzer, who knew (148) nothing about the busi-

ness, was being brought down just to act as president, and I was to break him in in this business. This boy knew nothing about the business. And this was to take place on a Saturday morning early.

The next thing I was told, that if I will do it that way, I will be assured of a job because I couldn't stay in business and it was only a matter of time that the other creditors would come in and, rather than to do that, he said we will wipe out all the creditors and just satisfy the Bucknell Trading Company and Fellerman and Mintz and I would be guaranteed a job in this new corporation.

Q. Was that to be your sole interest in the new corporation? A. Well, as time went along and if it prospered, I was to be given an interest in this new business.

Q. Who was to be the manager of the new business? A. I was to run the business.

Q. And what part was Irving Shear to play? A. Irving Shear was the president. He would have to sign checks and it would be a new corporation under his name.

(149)

During that week, Mr. Shulman, who was the Bucknell Trading, would go out and get a place for me to start this new corporation, and he did, and we got a place on 33rd Street and Broadway under the Berkeley Pennsylvania. He paid a deposit for the rent, and Mr. Shear was to sign checks, who was a brother-in-law to Mr. Switzer.

Q. Let me understand this. You say at the marshal's sale, who was to buy the property? A. Fellerman and Mintz were to buy it and then give the merchandise to Mr. Shear, who was the president of Berkeley Pennsylvania. He in turn would pay this $1,500, but Fellerman

and Mintz were to give him the $1,500 so that it could be bought.

Q. In whose name was it going to be bought? A. In Fellerman and Mintz and in Irving Shear of the Berkeley Pennsylvania.

Q. Now, in whose name would the bill of sale be made out? A. In Berkeley Pennsylvania, Irving Shear.

Q. What did you say about that? A. I said to him, "Mr. Switzer, is this right?"

He said, "Well, don't you trust me?"

I said, "Well, I don't know if a thing like (150) this should be done."

He said, "I have guided you and you can trust me."

I kept saying, "Is this right?"

He said, "Don't you trust me? Would I mislead you? I am your lawyer and you do what I tell you and you will have your job, all your mind will be clear, all your creditors will be off. You will start a new slate in a business that you know. You will start all over again and you will do good."

He said, "You are not getting younger. You can trust me."

So I listened, as my lawyer, to his instructions.

He next told me to take an inventory of the merchandise that I had and that was done on Tuesday.

Q. Wait a minute. A. Excuse me.

Q. Finish your sentence. A. I was then told that I would have to take an inventory.

Mr. Schwartz: May I have these marked for identification, please, as one exhibit?

The Clerk: How do you define these, Mr. (151) Schwartz? What are they?

Albert Faskow—for Government—By the Court

Mr. Schwartz: The last was 7. This would be Exhibit 8.

The Clerk: How do you describe it?

Mr. Schwartz: Four notes.

(Marked Government's Exhibit 8 for identification—four notes.)

By the Court:

Q. What was the name of the new corporation, Berkeley Pennsylvania or Berkeley Pennsylvania Jewelers? A. Berkeley Pennsylvania Corporation.

By Mr. Schwartz:

Q. Berkeley Pennsylvania Corporation? A. That is right.

Q. Mr. Faskow, I show you Government's Exhibit 8 for identification, consisting of four notes of Berkeley Jewelers, Inc., by Albert Faskow, President, to the order of Jack Fellerman, for $1,000 each (handing to witness). I ask you what those notes are? A. Well, these are the notes that Mr. Switzer told me to sign and give them to Fellerman and Mintz, which he came up with Mr. Fellerman at the time and I signed these.

(152)

Q. When was that? A. That was prior to the week of—I believe it was the 20th of January.

Q. Do you know why there are four separate notes? A. He told me that it would be easier if we had had these notes individually to be used in a smaller court. I don't know exactly the words, where it could be placed in a small court and it wouldn't be conspicuous and it would take an easier time and it could be done in a week or so.

I don't know the exact words. That is the substance of the reason, to the best of my knowledge.

Q. Did you ever get back the two head checks to the order of Morris Switzer that you had given? A. No, sir.

Mr. Schwartz: I offer in evidence Government's Exhibit 8 for identification.

Mr. Stim: No objection.

(Government's Exhibit 8 for identification received in evidence.)

By the Court:

Q. At the time these notes were delivered, did the Berkeley Jewelers, Inc. or you receive any funds (153) from Jack Fellerman? A. No, sir.

The Court: Very well.

Mr. Schwartz: Ladies and gentlemen, Government's Exhibit 8 in evidence—

The Court: Just a moment. When do you say it was that you made these notes out and delivered them? When was that?

The Witness: About a week before—it was the week after—either the 20th or the 13th of January.

The Court: Very well.

Mr. Schwartz: Ladies and gentlemen, Government's Exhibit 8 in evidence consists of four notes signed by Albert Faskow as president of Berkeley Jewelers, Inc. Each of these notes is payable to the order of Jack Fellerman. Each of them is also endorsed by Albert Faskow personally. Each of these notes is undated and payable on demand. No date inserted.

Albert Faskow—for Government—Direct

By Mr. Schwartz:

Q. Now, Mr. Faskow, did there come a time when you agreed to go along with this plan of Mr. Switzer's? A. I did, sir.

Q. When was that? (154) A. That was in the middle of January of 1950.

Q. 1950? A. Yes.

Q. And how did that come about? A. Well, Mr. Switzer brought Mr. Fellerman down with these four notes. I then signed them.

Q. When you say "four notes," do you refer to the notes that we have just described? A. Yes, sir, these four that we just showed. I signed them a week prior and the following week Mr. Fellerman came and said, "Can you pay these notes?"

I said, "No."

He said, "Then you know what we are going to do. We are going to serve you with a satisfaction of judgment."

Q. You mean a confession of judgment? A. A confession of judgment. And Mr. Switzer was there.

He said, "Now we are going to work this out."

The next day a marshal came to my place with Mr. Switzer and Mr. Ackerman, and they placed in my office on the wall this confession of judgment and said I had to give the key to Mr. Ackerman and that from now on he had the jurisdiction over the (155) place and that at the end of the week there would be a sale and it would be on Saturday morning; that his cousin ——

Q. Mr. Faskow, my question to you was to tell us when you agreed to go along with this plan. A. About the 19th or the 20th of January.

Q. Did you have a conversation with anyone at that time? A. I did.

Q. With whom? A. With Mr. Switzer.

Q. Tell us what that conversation was. A. Well, I felt that——

Mr. Stim: I object to what he felt. Let him give us the conversation.

The Court: Sustained. Tell us what he said and what you said, if anything.

A. I said to Mr. Switzer, "Do you think this is right, what you want to do?"

He said, "Don't worry."

The Court: You told us once before about that. Is this the second time you talked about it?

The Witness: Yes, this is the second time.

The Court: All right.

(156)

A. (Continuing) He said, "I now have further information. I went and spoke to somebody else, and what I am going to do is okay. You just follow what I am telling you," and then I followed his instructions.

Q. You say that you signed these four notes, Government's Exhibit 8 in evidence, and you gave those to Mr. Fellerman? A. Yes, sir.

Q. And that was in addition to the three head checks you had previously given him? A. That is right, sir.

Mr. Stim: In addition to what?

Mr. Schwartz: The three head checks.

Albert Faskow—for Government—Direct

By Mr. Schwartz:

Q. Who was present at the time that you gave— A. Mr. Switzer. He said this would replace—so that they could get their money, this would replace the checks that I owed them. In other words, now I was giving them notes for the checks because this they will use as a confession of judgment if I don't pay it.

Q. You had paid Fellerman and Mintz interest of $400 a month for over a year? (157) A. Yes, sir.

Q. Wasn't anything said about that at the time? A. No, nothing at all. I kept paying and, to the best of my knowledge, I believe the last month or two Mr. Mintz had a little pity on me. So, instead of charging me $400, he took $350. He said, "I will cut it down $50, but that will be what you will be paying me."

Q. Was there any reason why you should make these confessions of judgment in favor of Fellerman and Mintz rather than any of the other money lenders?

Mr. Stim: I object, your Honor. It calls for a conclusion.

The Court: I will sustain the objection as to form.

By the Court:

Q. At the time you had these conversations with Mr. Switzer, was there any discussion as to what should be done about the money that you owed to other money lenders? A. Yes, sir. He said that everything would be wiped out if I went into bankruptcy and I would start anew as a working man for Berkeley Pennsylvania, but he wanted to make sure that Bucknell and Fellerman and

(158) Mintz would be taken care of and he said the rest of the money lenders and the people that I bought merchandise from, they would all be wiped out because I went into bankruptcy.

By Mr. Schwartz:

Q. Why did you make these notes?

Did there come a time when you signed confessions of judgment? A. Yes.

Q. In whose favor did you sign these confessions of judgment? A. Fellerman and Mintz.

Q. Was anybody present when you signed these confessions of judgment? A. Yes, sir.

Q. Who was present at that time? A. Mr. Switzer.

Q. Did you have a conversation with Mr. Switzer at that time? A. I did.

Q. What did he say to you and what did you say to him? A. He said that I should follow his instructions, and being my lawyer I did as he told me and I signed (159) these confessions.

Q. Why did you sign confessions of judgment in favor of Fellerman and Mintz among all your creditors?

Mr. Stim: I object to that, your Honor, as calling for a conclusion.

The Court: Overruled.

Mr. Stim.: Exception.

The Court: Of course it calls for a conclusion.

A. He said with Fellerman and Mintz he could work with them because they are the type of people that he knew how to handle, and that when the sale would come he would be assured that he would get the merchandise for

his brother-in-law, Irving Shear, under the Berkeley Penn, and that these men would work with him 10% per cent.

Q. Did there come a time when a marshal came to your store? A. Yes.

Q. When was that? A. I believe on Tuesday of that week.

Q. What week was that? A. The 20th, the week of the 20th, or thereabouts.

Q. The 20th of what month? (160) A. Of January.

Q. Of what year? A. 1950.

Q. What did the marshal do when he came to your store? A. He came with Mr. Switzer and Mr. Ackerman. He pasted in my office these four judgments on the wall and I was told now I must give my key over to Mr. Ackerman and that from now on he was to be the custodian, who was a friend of Mr. Switzer's.

The Court: Now we will take our luncheon recess.

Remember, ladies and gentlemen, don't talk about the case among yourselves and certainly not with anybody else. Keep your mind completely open until all the evidence is in. 2:15.

We will recess at 4 this afternoon.

(Recess taken until 2:15 p. m.)

(161)

AFTERNOON SESSION

(2:15 p. m.)

(Jury in box.)

ALBERT FASKOW, resumed.

Mr. Schwartz: Mr. Reporter, may I ask that you please reread the last two or three questions and answers?

(Record read.)

The Court: You mean Mr. Ackerman was a friend of Mr. Switzer's?

The Witness: Yes, sir.

Direct examination continued by Mr. Schwartz:

Q. Now, did you have any further conversation with anyone at that time? A. Yes. Mr. Switzer then told me that I would have to take an inventory of the merchandise and that I should set aside—take the items and put them on a list and then I would give him the sheets of all the merchandise because he had to give the marshal a list of the items.

Q. Well, when were you to make this inventory? A. During that week.

Q. The week of January 29, 1950? A. That is right.

(162)

Q. Where was the merchandise situated at that time? A. Well, I had a stockroom where the bulk of my merchandise was, the showcases, the wall cases and in the safe.

Q. Did there come a time when you had a conversa-

tion concerning the merchandise in the showcase? A. Yes, sir.

Q. When was that? A. During the week, while we were taking inventory, Mr. Switzer told me that I should take out the better watches and diamond rings and gold and put them into the safe and just leave the watches, ordinary watches, in the showcases.

Q. Did you do that, sir? A. I did, sir.

Q. Now, at the time that the marshal made his levy, how many people had the combination to your safe? A. At that time I—before that time I alone had the combination to my safe.

Q. Did there come a time when you gave the combination to the safe to somebody else? A. I did, to Mr. Switzer.

(163)

Q. When did you give Mr. Switzer the combination to your safe? A. To the best of my recollection, the day that Mr. Ackerman came in, that day when they placed the judgments on the wall and I gave the key to Mr. Ackerman.

Q. Were there any other keys to your store than the one you gave to Mr. Ackerman? A. Yes, sir.

Q. What did you do with the other keys? A. I believe I gave the other key to Mr. Switzer.

Q. During the week prior to January 28, 1950, did you have access to the store of Berkeley Jewelers? A. The only time I could come in is when Mr. Ackerman opened up in the morning and then I could come in.

Q. Were there any times when that store was open that you were not present? A. Yes, sir.

Q. When would that be? A. During the week. I don't

know the exact time but the place was open when I came in.

Q. Who was the last person to leave that store in the evening during this week? (164) A. Mr. Ackerman would be the last to leave.

Q. Was anybody else in the store during that week? A. Yes, sir.

Q. Who else? A. My daughter and a couple of employees, who were helping in packing the merchandise.

Q. Anyone else? A. Mr. Switzer, Mr. Shulman came in to help to pack.

Q. What were you engaged in doing during that week? A. We were taking inventory and packing the merchandise in cartons and assorting the grading of merchandise, the better in certain packages and the bulkier stuff in larger packages, and the merchandise that was in the showcases, why, we didn't touch that during the week. Most of the other merchandise was packed.

Q. Will you describe this process of taking inventory? How did you list the various items? A. Well, I had—I would go and take an item and mark the items item by item. If it was a Waltham, 14 carat, $59, I would mark it Waltham watch, 14 carat, $59. (165) If it was a set of silver, I would mark set of Coronation, $74.50. If it was a ring that was an approximate carat, a half carat, 14 carat gold. That is the way I marked the items on the list.

Q. What did you do with this list after you finished? A. I gave the list to Mr. Switzer.

Q. And where did you give this list to Mr. Switzer? A. In the store.

Q. Did you have any conversation with him about that? A. Yes, sir. He said that he was going to typewrite the list so that he could give the list to the marshal.

Q. How often was Mr. Switzer in the store during that week? A. Every day.

Q. Did there come a time when a marshal's sale was held in your store? A. Yes, sir.

Q. What day of the week was that? A. Saturday morning of that week. I believe it was very early in the morning around 9 o'clock.

(166)

Q. Was that January 28, 1950? A. To the best of my knowledge, I believe that was the date.

Q. Were you there during the sale? A. No, sir.

Q. Did you come to the store on that day? A. I did, sir.

Q. About what time did you come there? A. Around one o'clock.

Q. Whom did you see there? A. When I arrived there, there was Mr. Switzer, Mr. Schulman and a boy by the name of Adler, a young man, and I believe I came with my wife.

Q. Did you have a conversation with anyone? A. I did, with Mr. Switzer.

Q. What was the conversation? A. And he said the packages with the merchandise, the better grade merchandise, meaning the solid gold watches, and the rings, they were going to take out immediately, because that merchandise was negotiable and easy to sell, it wasn't bulky, and they can turn that into cash right away.

Q. Was that subsequently done? A. Yes, sir.

(167)

Mr. Stim: I object to that, your Honor, and move to strike the answer. It is asking for a fact—

The Court: At any time while you were there was that merchandise taken out?

The Witness: Yes, sir.
The Court: Who took it out?
The Witness: Mr. Switzer and myself.

By Mr. Schwartz:

Q. Tell us how that was done, sir. A. Mr. Switzer had borrowed a station wagon.

Q. Did he tell you from whom he had borrowed it? A. Yes, from a man by the name of Herman Lipsig.

Q. Do you know where this man lived? A. Yes, sir. In Long Island.

Q. Do you know whereabouts in Long Island? A. Well, I don't know the exact street. It is in Queens. In Queens, I would say.

Q. In Queens Borough? A. Yes, sir.

Q. Would you continue to tell us how this was done? A. Mr. Schulman brought the station wagon, which belonged to Mr. Lipsig. We packed the better element of merchandise which was in cartons already, put it into (168) this station wagon and took it out to the home of Mr. Lipsig, made two trips: one to Mr. Lipsig, and then to another man, also a friend of Mr. Switzer; Cohen, I believe, Leonard Cohen. Both trips were made on the same day.

The following day, which was Sunday, I was told not to come too early but come towards the latter part of the evening, that we would take some more of the merchandise to Mr. Lipsig's home.

I had never met Mr. Lipsig prior to this time but on all occasions this was a truck—a station wagon belonging to Mr. Lipsig.

Q. Did you have any conversation with Mr. Switzer either on the Saturday or on the Sunday about the marshal's sale? A. Yes, sir.

Q. Would you tell us what the conversation was? A. On the day of the sale, is the question? Am I right on the question?

Q. On the day of the sale, yes. A. I had asked him how was this transacted. He said everything went fine. "It was bought for $1,500 and you will now get the merchandise. We will put the (169) merchandise into warehouses and part of it will go into the new store and whenever you will need to use it for the new business, you will be able to use the stuff that's in the warehouses but the merchandise that we have taken to the homes will be disposed of and the cash to pay off Bucknell and Fellerman and Mintz."

Q. Aside from these station wagon loads of merchandise that you have described, was any other merchandise removed from the premises of Berkeley Jewelers, Inc. while you were there? A. Yes, sir. In trucks.

Q. When was that done? A. That was done on Monday, and these trucks came and took the bulky stuff in large cartons to warehouses and to a place in Pitkin Avenue, which was also another brother's, Lipsig's brother, who had a furniture place, or a kitchen—where they made kitchen furniture, and he had a place in the warehouse, and part of it was out there, part of it was brought to a place called the National Plastic, a man by the name of Green, also a friend of Switzer's, where we put the merchandise there, and part of it, I believe, was sent into a warehouse.

I didn't go with the trucks but I know that (170) the merchadise was assorted and a few cartons were placed at 23rd Street in the new place, which I was supposed to use as samples in case I needed merchandise for my out-of-town business.

Q. You mentioned a store for the new corporation. A. Yes, sir.

Q. On the day of the sale was there a store, a particular store, designated for the new corporation? A. Yes, sir. During the week a place was located and a deposit was given by Mr. Shulman in the name of Berkeley Penn on Broadway and 2—to be exact, 24th Street, sir.

Q. Did you have anything to do with the negotiation of this lease? A. I did. I thought that that would be the proper type of a place because there was a clean show room and it had facilities that I would need, and I suggested that that would be the place. Mr. Shulman then had Mr. Shear sign a lease, who was the president of the new company. He left a deposit.

Q. Did anybody else besides the people you have mentioned take part in the negotiation of this lease? A. Mr. Switzer.

(171)

Q. What part did he play? A. Well, he went up to the place with us and looked the place over and he thought if I thought that would be what we wanted, that would be okay.

Q. You mentioned Mr. Shear. Is that Mr. Irving Shear? A. Irving Shear.

Q. When was the first time you met Mr. Irving Shear? A. I believe the first time was at Mr. Switzer's home many months before and introduced as a brother-in-law, and then the next time was during the day of the sale, on the Saturday of the sale.

Q. And did you have a conversation with Mr. Shear? A. Yes, very little. Mr. Irving Shear was just used as

a name. The boy was—the boy worked in the post office and knew nothing about the business and was brought there for me to break in and teach him the business. He had nothing to do with any negotiations outside of writing the checks and transacting in name only.

Q. Did this new corporation, Berkeley Pennsylvania, thereafter start doing business? (172) A. It did. It continued right from where I had left off from Berkeley Jewelers to Berkeley Penn. It continued right ahead.

Q. What, specifically, was the business of Berkeley Pennsylvania? A. It was a continuation of the same lay-away plan where my people, who had known me for many, many years, I just told them it was a new company and that we were going to continue the same way that we have always been doing, and the business kept on going. Collections were made weekly. There was no stop. People had received their merchandise and bought new merchandise and it continued at the same rate.

Q. Would you tell the members of the jury approximately how many of these lay-away accounts you had in Berkeley Jewelers, Inc., that is, the old corporation, at the time that this marshal's sale took place? A. About a thousand; around a thousand.

Q. And were there any records of these lay-away accounts? A. Yes, sir.

Q. And what did those records consist of? (173) A. Well, it consisted of a card and a deposit in the book showing when the payments were made. When they paid me a card was marked and then payment was made in the book. If merchandise was delivered, it was taken off the amount that they had laid away for and then the amount was subtracted and they would continue and, if

at Christmastime they wanted more, they could have as much as the money that they had laid away.

Q. What happened to these card records of Berkeley Jewelers, Inc. after the marshal's sale? A. Well, they were taken completely into the Berkeley Penn, and Berkeley Penn carried on from then on with the collection, and the merchandise that I was supposed to have received was taken back from this new store and put into a warehouse because Mr. Switzer thought it best to put it away and, instead of me getting the merchandise, the moneys I then received I had to buy new merchandise for the people that were buying on these lay-away plans.

Q. Did you have any merchandi left in the store that you had rented for Berkeley Pennsylvania? A. Yes, there were a few samples that I had taken out from the original stock that was brought to Berkeley (174) Penn in the new place, but——

Q. Was that part of the stock of the old corporation? A. Yes, that was part of the stock of Berkeley Jewelers.

Q. Did the new corporation have a bank account? A. Yes, sir.

Q. Where was that bank account? A. In the Amalgamated Bank on Union Square.

Q. And who had the power to write checks for that corporation? A. Irving Shear, who was the president of the company.

Q. How was the business of Berkeley Pennsylvania handled? Who was managing the business? A. Well, I was there from the week we closed to the first week in March. My daughter, who was working for me in Berkeley Jewelers, went along with me, and she ran the inside business, plus one employee by the name of Adler.

I went on the road to take care of the road business and was to take Mr. Shear out to break him in, but after the second week Mr. Shear returned to Boston. He had signed a lot of checks and returned (175) back to his job.

Q. When you say he had signed a lot of checks, you mean he had signed those checks— A. In advance.

Q. In advance? A. So that we will have checks to buy merchandise with.

Q. In the time that Irving Shear was there, what did he do? A. Nothing. Nothing. He just was listening to what I would tell him and I was supposed to have taken him on the road and he didn't go. And I went out on the road and I continued my business. I laid off the collector, I collected myself and sold as much as I could to try to build up the business.

Q. Who bought merchandise? A. I used to come home in the weekends and buy a little, and my daughter during the week would fill orders during the week. This went on until the first week in March of 1955.

Mr. Stim: 1955?

The Witness: I am sorry. 1950. I am sorry.

Q. Did you take any money out of the corporation? (176) A. No, sir; just expenses was given to me.

Q. Did your daughter take any money out of the corporation? A. No, sir. No salaries were given to my daughter. My daughter worked without any money. We had no money. The money that we were getting in we had to buy merchandise to fulfill the obligations of my cards.

Q. Did you make any other payments? A. Yes, sir.

Q. Would you tell us— A. Mr. Switzer and Mr. Shul-

man insisted that I pay off the Kwartin loan out of the Berkeley Penn and they made me give checks—not me, but they made Mr. Shear write out checks of $50 to pay off the Kwartin loan which was the loan I had borrowed on the Berkeley Jewelers.

Q. How much was the Kwartin loan at this time? A. Well, it was reduced. I wouldn't know exactly, sir, but we were paying $50 a week.

Q. $50 a week? A. Yes, sir.

Q. Was that by checks or notes? A. I think by check. I am not positive.

(177)

Q. Had Berkeley Pennsylvania borrowed any money from Kwartin? A. No, sir, never.

Q. Did there come a time when you had to enter the hospital? A. On March 10—no, on the 2nd of March.

Q. Of what year? A. Of 1950. I was on the road and I was rushed to a hospital in Harrisburg. They found that I had——

Mr. Stim: I object.

By the Court:

Q. You were put in a hospital? A. Yes.

Q. Did you stay there any length of time? A. One day, sir.

I then returned to New York and went to see a doctor in New York, and the following week——

Mr. Stim: I object—go ahead.

By Mr. Schwartz:

Q. Did you enter a hospital in New York? A. Not at that time, sir. I went out the following week and worked part of the week and then was brought back and entered into the hospital.

Q. When did you enter into this hospital in New (178) York? A. About the 10th of March.

Q. Of— A. Of 1950.

Q. Did the business of Berkeley Pennsylvania continue while you were in the hospital? A. It did, sir.

Q. Who ran the business? A. My daughter, with a collector who went out and did the business and collected in the moneys and delivered the merchandise, and I remained in the hospital for the rest of five months.

At the end of that time I came out and went back to see how things were in the place. My daughter was telling me she was trying to keep the business up the best that she could——

Q. Mr. Faskow, during this time that you were in the hospital, did you speak about the business of Berkeley Pennsylvania to anyone other than your daughter? A. Yes.

Q. With whom did you discuss the business of Berkeley Pennsylvania? A. Mr. Switzer.

Q. Will you tell us what you talked with him (179) about? A. Mr. Switzer thought the best thing to do is to finish out the business. In fact——

The Court: What do you mean by that, "finish out the business"?

The Witness: Just clear the business and get the accounts without looking for any further busi-

ness and get these accounts straightened out, and that would be the end of Berkeley Penn.

By Mr. Schwartz:

Q. Did there come a time when that— A. That did happen. That process finished and merchandise was delivered to all the people and the accounts were closed.

Q. When was that? A. That was the end of 1959.

Q. Do you know what happened to the merchandise that was in the warehouse, the balance of the merchandise of the old corporation? A. I was later informed——

Q. No. What do you know of your own personal knowledge? If you know nothing, say so. A. Pardon me.

Q. Do you know of your own personal knowledge (180) what happened to the balance of the merchandise of the old corporation? A. I understand it was sold.

Q. Do you know that of your own knowledge? A. Yes, sir. I mean I was told that. I don't know of my own knowledge.

By the Court:

Q. Did you have anything to do with selling it? A. No, sir.

Q. It is your story, as I understand it, that whatever merchandise you used to deliver to the accounts in the lay-away plan you purchased new? A. Yes, sir.

Q. And that you did not use any of the merchandise that had been taken out of the Berkeley and put in the warehouse? A. That is right, sir.

Q. That was disposed of in some other way. You have been told it was by sale? A. That is right.

The Court: Very well.

Mr. Schwartz: May the record show that I have

taken a document from Government's Exhibit 1 for identification, and may I ask that this document be (181) marked for identification.

The Clerk: The next exhibit number.

Mr. Schwartz: It could be Exhibit 1——

The Clerk: 1F was the last in that series of 1.

The Court: 1F, you say?

The Clerk: Yes, now in evidence.

Mr. Schwartz: Would you mark this 1G for identification.

(Marked Government's Exhibit 1G for identification.)

By Mr. Schwartz:

Q. Mr. Faskow, are you familiar with the stock of merchandise that Berkeley Jewelers, Inc. had at the time of the marshal's sale on January 28, 1950? A. Yes, sir.

Q. I show you Government's Exhibit 1G for identification and I ask you if you have ever seen that or a carbon copy of that before (handing to witness)? A. Yes, sir.

Q. And you have at my request studied this list? A. Yes, sir.

Q. And at my request did you examine this schedule in order to determine whether it reflected all (182) of the merchandise that was in the inventory of Berkeley Jewelers, Inc. as of January 28, 1950? A. Yes, sir.

Q. Would you tell the ladies and gentlemen of the jury what the result of your check was? A. After going over——

Mr. Stim: Just one minute. I object to that, your Honor, unless we have a foundation laid, either the inventory at that time when the sale was had

or any inventory approximately at the same time, in order to have a comparison made.

The Court: Overruled.

Mr. Stim: Exception.

The Court: That goes to its weight. I assume you will cross examine on it.

I say the objection you make merely goes to the the weight of the testimony and I shall overrule the objection.

Mr. Stim: Exception.

Mr. Schwartz: Mr. Stenographer, would you be good enough to read the last question.

(Question read.)

The Court: First of all, the paper that you have marked Exhibit 1G for identification is a copy (183) taken from the files of this court.

Mr. Schwartz: That is so, your Honor.

The Court: And it is entitled "The Appraiser's Oath" and the appraisal that was filed by some appraiser in the bankruptcy proceeding involving Berkeley Jewelers, Inc.

Mr. Schwartz: Yes, your Honor.

The Court: And on its face that purports to be the inventory as found and evaluated by the appraiser.

Mr. Schwartz: That is so.

The Court: It was filed for bankruptcy purposes in the court. Now, as I understand it, you have asked this witness whether or not he has examined it at your request, and he says he has; and you have asked him now whether or not his examination discloses that the appraisal as filed is different in some way from the inventory which he saw at the time it was made in 1950; is that correct?

Mr. Schwartz: That is so, your Honor.

The Court: Very well. And you have now asked him to point out in what respects the inventory of 1950 differs from the appraiser's statement. What is the date of the appraiser's statement as it appears (184) there?

Mr. Schwartz: If your Honor please, I will offer this in evidence subject to connection at a later point.

The Court: Let me ask a general question first.

By the Court:

Q. You have, you say, some familiarity with the original inventory that was made in January, 1950? A. Yes, sir.

Q. Very well. And at counsel's request you have examined this appraiser's statement? A. Yes, sir.

Q. And you have found some differences— A. Yes, sir.

Q. —between the original inventory as you recall it and the appraiser's statement as it appears in this paper? A. Yes, sir.

The Court: Very well. Now do you want to offer the paper?

Mr. Stim: Your Honor, I object to it further on the ground that we don't know as to what date the inventory was taken by the appraiser, whether any mer- (185) chandise was on hand at the time when the original inventory was taken in 1950, in January, whether any of it was sold by the trustee in bankruptcy, whether they were seized by any creditor or what happened to it.

All we asked this witness to say is whether or not he examined this inventory, of a date we don't

know, without laying any foundation that all of the merchandise which was on hand or inventoried in January, 1950, has been turned over to the appraiser of the estate in bankruptcy.

I think it is calling for speculation, leaving out entirely facts which would determine whether or not all of the inventory was accounted for at the time when the trustee took possession. We have evidence that he had merchandise——

The Court: Please. You keep on going.

Mr. Stim: Pardon.

Mr. Schwartz: May I be heard, your Honor?

The Court: May I see the order in that file appointing the appraiser?

Mr. Schwartz: May I have that marked for identification, if your Honor please?

The Court: There isn't any doubt that this (186) appraisal is part of the file and it is the appraiser's file in the bankruptcy proceeding.

Mr. Stim: That is right, your Honor, but——

The Court: Let's get the foundation laid. You will agree, I suppose, that the appraiser was appointed pursuant to an order of either the referee or one of the district judges?

Mr. Stim: That is correct.

The Court: And this paper was filed purportedly in pursuance of whatever duty he had under the law.

Mr. Stim: Correct. I may say to your Honor I will have no objection if the district attorney has the inventory of the marshal, because it is a public record.

The Court: All right. Just a moment, please.

Albert Faskow—for Government—By the Court

Do you want to offer this paper in evidence, Mr. Schwartz, at this time, this appraiser's statement?

Mr. Schwartz: I offer it in evidence.

The Court: Now, you object to it?

Mr. Stim: If it is offered as merely the merchandise that was appraised by the appraiser, I have no objection.

The Court: He is offering a document from (187) the file of the court. I will receive it.

Mr. Stim: I have no objection to that merely as a document.

The Court: So we have that in evidence.

(Government's Exhibit 1G for identification received in evidence.)

By the Court:

Q. You were asked whether or not you had a present recollection of the inventory that you have told us was made in the week before January 20, 1950? A. Yes, sir.

Q. And you have told us also that, at the request of the district attorney, you have examined the schedules which appear in this paper, Exhibit 1G, the appraiser's statement? A. Yes.

Q. You have told us also that you note an absence or a difference— A. Yes, sir.

Q. —in the appraiser's statement from the schedules which you saw made up at the time of the inventory? A. Which I made up.

Q. Which you made up? (188) A. Yes.

Q. Let me ask you: Do you now have a copy of those schedules that you made up in 1950? A. No, sir.

Albert Faskow—for Government—By the Court

Q. You told us earlier when you made it up you did it in handwriting? A. I did, sir.

Q. And you turned that over to Mr. Switzer? A. I did, sir.

Q. Will you now tell us whether or not after you did that you ever saw those again? A. No, sir.

Q. Very well. So that any comparison you now make you are making on the basis of a recollection? A. Yes, sir.

The Court: All right; go ahead.

Mr. Stim: Your Honor, may I make this further objection, that if there is any discrepancy—I don't know if there is—I don't want the jury to infer that the defendant Switzer is in any way responsible for it. We have no evidence that this merchandise was in his custody since January, 1950——

The Court: Mr. Stim, we can only try lawsuits one step at a time. What argument the district (189) attorney is going to make from this I do not know. I am ruling now only on the question of whether or not the questions which he has asked about the comparison may be answered, and I now rule that they may. You may have an exception to my ruling.

Mr. Stim: I respectfully except.

The Court: Very well.

You are now going to tell us, if you can——

Mr. Stim: May I——

The Court: Just a moment.

You are now going to tell us in what respect this appraiser's statement differs from the inventories

which you prepared and turned over to Mr. Switzer. Go ahead.

The Witness: After looking this over, I find that all of the gold watches, silverware, rings, diamond rings, are missing off this schedule, that none of them appear here on this that I read.

The Court: Gold watches, diamond rings——

The Witness: Silverware. Also a lot of small appliances which I know we had, like television—small radio sets—are missing, and also a line of clocks are missing, which I had a lot of, which I don't see in here at all. It is not in here.

The Court: And these various items (190) consisting of gold watches, diamond rings, silverware, small appliances and clocks which you say are not listed in Exhibit 16 were in fact listed on the inventory that you prepared in January, 1950?

The Witness: Yes.

The Court: Very well.

By Mr. Schwartz:

Q. Mr. Faskow, did there come a time when you were subpoenaed to appear as a witness before a referee in bankruptcy? A. Yes, sir.

Q. Do you recall when that was? A. 1952. I am not sure of the dates. I am sorry. I know I was subpoenaed to a referee.

Q. Did you speak to anyone about your appearance before the referee? A. I did.

Q. To whom did you speak? A. Mr. Switzer.

Q. Did you have a conversation with Mr. Switzer? A. I did.

Q. What did you say to Mr. Switzer, what did Mr.

Switzer say to you? A. Well, I believe I was called to the grand (191) jury——

Mr. Stim: Your Honor——

A. —I mean, to the referee. I asked Mr. Switzer and he instructed me what to answer, what to say when I was called before the referee.

Q. Can you tell us what Mr. Switzer said that you should say? A. I couldn't remember.

Mr. Stim: What is it?
The Witness: I don't remember.
The Court: He says he cannot remember.

Q. Did Mr. Switzer tell you to say——

Mr. Stim: I object, your Honor, to a leading question.

Mr. Schwartz: The witness has exhausted his recollection, your Honor.

The Court: Maybe he has, but you had better lead him a little differently.

By the Court:

Q. How long did this conversation between you and Mr. Switzer last, this one that you say occurred prior to the time you testified? Was it an hour, two hours, a day, a week, how long? A. It was on more than one occasion, your Honor. (192) He told me one time and then he instructed me again.

Q. Did you make more than one appearance before the referee? A. I believe two appearances.

Q. Two appearances. And did you talk to Mr. Switzer prior to each appearance? A. Yes, sir, and he had——

Q. How long did the conversations between you last? A. About an hour or two, because he had taken me to another lawyer's office and there instructed me what to say.

The Court: Just a moment.

Mr. Stim: I move to strike that out, your Honor, instructed him what to say.

The Court: The jury will disregard that. We will try to find out what was said.

By the Court:

Q. The first time you got a subpoena to come before the referee? A. Yes.

(193)

Q. When you got the subpoena, did you go and tell it to Mr. Switzer? A. I did.

Q. Is that the time he took you to another lawyer? A. Yes, sir.

Q. Then you sat down with Mr. Switzer and the other lawyer and you had a conference? A. That's right.

Q. Was the subject of your conference the testimony that you were going to give to the referee? A. What they would ask me, yes.

Q. Was there any discussion about the merchandise that was in the premises at the time of the bankruptcy? A. Yes, sir.

Q. Did anybody suggest to you what you should say in your testimony? A. Mr. Switzer told me just to tell what happened and what merchandise was there, and I don't remember, your Honor, exactly. It is six years ago.

/

Albert Faskow—for Government—By the Court

Q. That is all right. We are trying to find out. Either you remember or you don't. A. I can't remember the exact words. I know I was instructed to say certain things and what ques- (194) tions were asked of me I wouldn't remember.

Q. Do you remember the subject matter on which you were given instructions? A. (No response.)

Q. Let me ask you this: Was the subject of your conference with Mr. Switzer and this lawyer the various loans? A. Yes, sir.

Q. Did anybody suggest to you what you ought to tell the referee with respect to the loans? A. The only loans——

Q. The answer to that is yes or no. A. Yes, sir.

Q. Did Mr. Switzer suggest anything you should say about the loans? A. I can't remember, sir.

Q. Very well. Was there discussed between you, on the one hand, and Mr. Switzer and the lawyer, on the other hand, the question of these gold watches and diamond rings, silverware, appliances and clocks? A. No, sir. It was never discussed.

Q. What other subject? Now that we are talking about it, is your recollection being refreshed in any way as to what you might have talked about? (195) A. I believe Goldman & Frier were the people that were to question me. They represented the creditors——

Q. They represented the trustee. A. —and they wanted to know what happened to the merchandise and I was to say all the merchandise was sold on the sale. That is the best that I can remember.

By Mr. Schwartz:

Q. Was there any discussion——

The Court: That was the truth, wasn't it? Isn't that what happened?

The Witness: Yes, sir.

Q. Was there any discussion as to your testimony concerning the circumstances of this sale? A. I don't understand that.

Q. Did you testify before the referee in bankruptcy as to how it happened that this sale was held on January 28, 1950? A. Yes, sir. I did.

Q. Do you recall what you testified before the referee in bankruptcy as to how this sale happened to be held on January 28, 1950? A. I explained the situation the way it was (196) and how the judgment was served to me and then the sale was performed.

Q. Did you tell the referee in bankruptcy everything that you have told the members of this jury today? A. No, sir. No, sir.

Q. Did you tell the referee in bankruptcy anything that was not true? A. Yes, sir.

Mr. Stim: I object to that, your Honor.

The Court: Overruled.

Mr. Stim: How is it binding upon us?

The Court: Overruled.

Mr. Stim: Exception, except he is impeaching his own witness.

The Court: Overruled.

By Mr. Schwartz:

Q. Do you recall what——

Albert Faskow—for Government—By the Court

By the Court:

Q. Prior to your testimony before the referee in any of the conferences that you had where Mr. Switzer was present, did anybody suggest to you that you tell the story which you did tell the referee? Did anybody suggest that to you? (197) A. Yes, sir.

Q. Was there a discussion of what facts you should leave out? A. Yes, sir.

Q. And who told you to do that? A. Mr. Switzer.

Q. And you testified in accordance with the instructions which you say he gave you? A. Yes, sir.

The Court: Very well.

By Mr. Schwartz:

Q. Did there come a time when you were subpoenaed to appear as a witness before the grand jury? A. Yes, sir.

Q. Were you represented by counsel at that time? A. Yes, sir.

Q. Who was your attorney? A. Mr. Switzer.

Q. Did you have a conversation with anyone about that subpoena? A. Yes, sir.

Q. With whom did you have a conversation? A. With Mr. Switzer.

Q. Will you tell us what the conversation was? (198) A. I told him about being called to the grand jury and he said that I should not go.

Mr. Stim: Should not what?

The Witness: I should not appear before the grand jury.

Mr. Stim: Your Honor, I move to strike out the right of a district attorney to inquire into the advice to his client as to whether he should appear or not.

The Court: He is the client.

Mr. Stim: He said he represented him. He testified that he was his lawyer.

The Court: That's right. Now he is asking what he said. The client may say what the lawyer told him. The rule is that the lawyer may not disclose what a client tells him unless the client agrees to it.

Mr. Stim: Except, your Honor, I believe your Honor should instruct the jury that instructions or recommendations or advice of a lawyer to a client in a situation of this nature are not in violation of any law. He has a perfect right and duty to advise him.

The Court: I don't know whether it is a (199) violation of law or not. That depends on what he advises him to do. For instance, if I should go to my lawyer and he should tell me I ought to shoot somebody——

Mr. Stim: That is different, but not to appear before the grand jury, that is another story.

The Court: That is all right. Nobody has said that that was a crime of any kind. I don't know what the basis of your objection is. I assume that a client is competent to testify what he said to his lawyer and what his lawyer said to him.

Mr. Stim: The client can do so, that is right, there is no privilege, as long as he waives the privilege.

The Court: This man says when he got a subpoena to come before the grand jury he talked to the present defendant and he said that the present defendant, Mr. Switzer, told him, the witness, not to answer the subpoena.

Did he say to you "Don't answer it," or did he say to you, "You don't have to answer it"?

The Witness: "You don't have to answer it."

Mr. Schwartz: No further questions. You may cross examine.

* * * *

(458) * * *

JACK SHULMAN, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. Mr. Shulman, what do you do for a living? A. I am in the real estate management business.

Q. Keep your voice up so that the last juror in the box can hear you, sir. A. Yes, sir.

Q. What was your business, sir, in the years between 1948 and 1950? A. I was in the factoring business at the time.

Q. What was the name of your factoring business? (459) A. The Bucknell Trading Corporation.

Q. You are one of the defendants in this case, Mr. Shulman? A. Yes, sir.

Q. And you have pleaded guilty? A. Yes, sir.

Q. Do you know a man named Morris H. Switzer? A. Yes, sir.

Q. Do you see Mr. Switzer anywhere in this courtroom? A. Yes, I do.

Q. Kindly point him out. A. Yes.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer.

The Court: Yes.

Q. When did you first meet Mr. Switzer? A. I met Mr. Switzer first early in 1948.

Q. Who introduced you to him, sir? A. My father. He had known Switzer as a young attorney many years back.

Q. How did it come about that he introduced you to Mr. Switzer? A. Well, my father had met Switzer, a chance (460) meeting, early in 1948 and at that time Switzer told him that he was——

Mr. Stim: I object to any testimony as to any conversation between Switzer and his father prior to the date of the conspiracy.

The Court: Were you present at that time this conversation was had between Switzer and your father?

The Witness: No, sir.

The Court: Very well. Sustained.

Q. Did you subsequently have a conversation with Switzer? A. Yes, sir, I did.

Q. When was this? A. It was in April of 1948.

Q. Was anyone else present at that time? A. Yes, my father was present at the time.

Q. Will you state what the parties to that conversation said? A. Yes, my father brought us together and

at the time I was looking to go into a business and Switzer told us about the factoring business, that he had been associated for many years with it and that he thought it was a good business to go into at that time.

Q. Did you subsequently go into the factor (461) business? A. Yes, I did.

Q. Was that under the name of the Bucknell Trading Corporation? A. Yes, sir.

Q. Did you have an office for that business? A. Yes, at 1451 Broadway.

Q. When did you open that office for the business? A. In the middle of April, 1948.

Q. Did anyone share that office with you? A. Yes, sir, I shared office space with Mr. Switzer, in Mr. Switzer's office.

Q. Who were the principals of the Bucknell Trading Corporation? Were you the only stockholder in that corporation? A. I was the only stockholder, yes. I was the president of the corporation and Morris Switzer was the secretary.

Q. Did Mr. Switzer have any interest in the Bucknell Trading Corporation? A. Well, he was to receive a share of the profit of all the business which he brought in.

Q. What share was that? A. It was to be one-third of the profits.

(462)

Q. Did the corporation have an attorney? A. Yes, the attorney for the corporation was Morris Switzer. He formed the corporation and became the lawyer for our business.

Q. You have described the business of the Bucknell Trading Corporation as a finance business. A. Factoring business.

Q. Will you describe to the Court and jury what the factoring business is?

The Court: Describe the factoring business that you carried on at Bucknell Trading.

A. The factors business as we carried it on at Bucknell Trading consisting mainly of advancing money against accounts receivable. However, we did make occasional loans of other nature, too.

Q. And in connection with those loans did you charge interest? A. Yes, sir.

Q. Did there come a time when you met a man named Albert Faskow? A. Yes, sir.

Q. When did you meet Albert Faskow? A. April 28th of 1948.

Q. Who introduced you to him? (463) A. Morris Switzer.

Q. What was the business of Albert Faskow at that time? A. He had a discount jewelry house where he sold jewelry at a discount from the so-called retail price.

Q. What was the name of that discount jewelry business? A. Berkeley Jewelers, Inc.

Q. Did there come a time when you had a conversation with Mr. Faskow? A. Yes, it was on that day, April 28th of 1948.

Q. Was anyone else present? A. Yes, Morris Switzer was present. He took me over to Berkeley Jewelers, which at that time was at East 29th Street for the purpose of making the first loan of the new corporation.

Q. Would you state what the conversation was at that time between yourself, Mr. Faskow, and Mr. Switzer? A. Well, Switzer brought me down there and as he took

me down he explained to me that this was to be our first transaction, that it was to be a loan to the corporation, and as security for it we were to receive, (464) Bucknell was to receive an unrecorded deed to his home.

The Court: To whose home?
The Witness: To Faskow's home.

Q. What was the amount of the loan? A. $3,000.

Q. Was there interest on the loan? A. Yes, $250 on the loan.

The Court: How much was the loan?
The Witness: $3,000.

Q. For what period of time was the loan taken out? A. I think it was a four-month loan payable monthly.

Q. Did Mr. Switzer have an interest in the profits of that loan? A. Yes, he had an interest in the profits of that loan.

Q. Did you ever make any other loans to Berkeley Jewelers, Inc.? A. Yes, we made subsequent loans to Berkeley Jewelers.

Q. Over what period of time? A. Well, loans were made up until approximately December of 1949.

Q. Was that first loan ever paid? (465) A. Yes, sir, the first loan was paid, but subsequent loans were made before the first loan was paid.

Q. Would you describe your relationship with Berkeley Jewelers in your business as a continuous one? A. Yes, sir.

Q. Between April of 1948 and December of 1949? A. Yes, sir.

Q. Did the Berkeley Jewelers, Inc. owe money to the Bucknell Trading Company at all times between those dates? A. Yes, sir.

Q. Now, were all of the loans on identical terms and conditions? A. No, all the loans were not on identical terms and conditions.

Q. Did you receive any collateral security on any of these loans? A. Yes, on several of the loans I received merchandise, and on one of the loans I received a trust agreement covering certain merchandise on the premises.

The Court: You say on some of these you got merchandise as collateral?

The Witness: Yes, sir.

The Court: In those instances was (466) merchandise actually delivered to your office?

The Witness: Yes, sir.

The Court: In the other instance the merchandise was not delivered to you; it remained on the premises of Berkeley, but you got a trust certificate in its place?

The Witness: Yes, sir.

Q. You say there was only one transaction on which you were given a trust receipt covering merchandise? A. Yes, sir.

Q. I show you Defendants' Exhibit U in evidence and I ask you whether that refreshes your recollection as to the particular transaction on which you received this trust agreement? A. Yes, sir, it does.

Q. When was that loan made? A. August 2, 1948.

Q. Is that Defendants' Exhibit U in evidence the trust agreement that you received in connection with that loan? A. Yes, sir.

Q. For what period of time was that loan taken out? (467) A. For a period of time of several months.

Q. Will you look at the trust agreement and see whether that refreshes your recollection. If it does not, say so. A. It does not.

Q. It was a loan taken out for a period of several months from August 2, 1948? A. Yes, sir.

Q. Do you recall whether that particular loan was paid? A. Yes, that particular loan was paid.

Q. Did this trust agreement continue in effect after that loan was paid? A. No, sir.

The Court: Do you know whether it was paid?

The Witness: No, your Honor, I assume it was paid several months thereafter because there were continuing loans made.

Mr. Stim: I move to strike out the assumption.

The Court: You are assuming that; you have no knowledge?

The Witness: No.

Q. After this particular loan was paid did you (468) make any other loans to Berkeley Jewelers? A. Yes, we made numerous subsequent loans.

Q. Did you have collateral security of any kind on those subsequent loans? A. Yes, on two loans in particular I know I received some merchandise and another loan I received the stock of a delicatessen which Faskow had an interest in as security.

Q. Were any of those loans subsequently paid? A. Yes, I would say in general that the loans were continuous and money was constantly being paid and new money was being advanced.

Jack Shulman—for Government—Direct

Q. What did you do with the collateral when these loans were paid? A. I held all collateral.

The Court: You held all the collateral?

The Witness: Yes, sir.

The Court: Including the trust certificate?

The Witness: Well, that was not merchandise that was in my possession.

The Court: I say, did you continue to hold the trust certificate?

The Witness: The trust agreement? Well, sir, we had a file in which I kept all the legal papers.

(469)

Q. Do you recall whether there was money owed to the Bucknell Trading Corporation by the Berkeley Jewelers, Inc. in the month of December, 1949? A. Yes, sir, there was.

Q. Will you tell the Court and jury approximately how much money was owing from Berkeley Jewelers to Bucknell Trading on and about December 15, 1949? A. Approximately $13,000.

Q. Did there come a time, Mr. Shulman, when you became concerned as to whether that money was going to be paid to your corporation? A. Yes, sir.

Q. When was that, sir? A. It was around Christmas time of 1949 that Switzer came to me and told me that Faskow or Berkeley Jewelers' position was very bad, that they were completely insolvent and that they had some important obligations coming up in the near future.

Mr. Schwartz: May I approach the bench for just a moment, sir?

(Discussion at the bench off the record and out of the hearing of the jury.)

The Court: All right, ladies and gentlemen, we will adjourn now until 10:30 tomorrow morning.

(Whereupon an adjournment was taken to April 11, 1956, at 10:30 A. M.)

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(470)

New York, April 11, 1956,
10.30 a. m.

Trial resumed.

(Jury in box.)

JACK SHULMAN, resumed.

Direct examination continued by Mr. Schwartz:

Q. Mr. Shulman, you testified yesterday that about the middle of December, 1949, the Berkeley Jewelers, Inc. owed Bucknell Trading Corporation, your company, approximately $13,000; is that so? A. Yes, sir.

Q. Now, did there come a time when you became concerned about the financial condition of the Berkeley Jewelers, Inc.? A. Yes, sir.

Q. When was that, sir? A. It was around Christmas time of 1949 that Switzer came to me and told me that Faskow's position was completely hopeless.

(471)

The Court: When was this?

The Witness: In December of 1949, around

Christmastime, sir. He told me that Faskow's position was completely hopeless and that he had some pressing obligations coming up which he could not possibly meet. When he told me this, I was very much concerned.

Mr. Stim: He wasn't asking for a conversation. He was asked when he found out about the thing.

By Mr. Schwartz:

Q. Please relate the conversation that you had with Mr. Switzer at that time. Continue with that. A. Yes. After he told me the conditions that existed, he told me that Faskow was insolvent, as I said before, and that he could not possibly meet the obligations that were coming up.

Q. What did you say to that? A. Well, I was very, very much concerned because of the money involved, and I asked him what was what, what would be what on the whole matter, and he told me that he had worked out a plan whereby I could realize the money that was coming to me, and at that time he outlined the plan to me.

(472)

Q. What did he tell you that this plan consisted of? A. Well, he at that time mentioned to me the fact that Sam Mintz, another creditor, was owed $4,000 by Berkeley Jewelers.

Q. Was that the first time you heard about Sam Mintz? A. That is the first time I heard of him in connection with loans to Berkeley Jewelers. He told me that Mintz was owed the $4,000 and that he would have Faskow execute four $1,000 confessions of judgment to Mintz; that after the judgments were entered a levy would be placed on the

goods of the Berkeley Jewelers, and that he would arrange for a marshal's sale to be held within one week.

Q. Now, the loan from Mintz to Berkeley Jewelers was for $4,000, was it, sir? A. Yes, sir.

Q. Was anything said about the fact that four $1,000 judgments were to be filed? A. Yes, sir. Switzer mentioned to me that he would file the judgments as four $1,000 judgments so that he could enter it as a Municipal Court action rather than a Supreme Court, and in that way the (473) sale would come off quicker and there was no need for advertising in the newspapers.

Q. What else, if anything, did he tell you about this plan? A. Well, at that time he said to me that I should not be concerned because the merchandise would be bought in, he proposed to have it bought in by a brother-in-law of his by the name of Irving Shear, and that he would set up a new corporation called Berkeley Pennsylvania. This new corporation was to take over the one aspect of Faskow's business which was profitable, namely, the sale of goods on the road at $1 down, $1 a week. It was the one aspect of the business wherein Faskow was making money, and he told me that, after the goods would be bought in, I would be taken care of and that Mintz would be taken care of, and that any excess or any merchandise that was available would be used for the promulgation of the new business.

Q. When you say that you would be taken care of, how would you be taken care of? In what respect, sir? A. Well, although he wasn't specific, it was a question——

Mr. Stim: I object.

(474)

The Court: Sustained.

What did he say?

The Witness: He said to me that the merchandise which would be bought in would belong to us.

By Mr. Schwartz:

Q. When you say "us," whom do you mean, sir? A. Well, the Bucknell Trading Corporation. And, also, he mentioned Sammy Mintz would be paid off also.

Q. Did there come a time when office space was obtained for the new corporation, the Berkeley Pennsylvania Corporation? A. Yes, sir. During the week, between the marshal's levy and the sale, Switzer asked me to accompany Faskow in search of a loft and I spent one afternoon with him and I located a loft that he seemed to like on Broadway in the 20's and at that time I laid out $10 which he used as a deposit on that loft.

The Court: Who was it you went with—Faskow?
The Witness: Yes, sir, Faskow.

Q. Now, can you fix approximately the date when this deposit was made on the loft for the new corporation? (475) A. I know the sale was held on January 28, and I know that the deposit was placed on the loft several days before the sale was to take place.

Q. Did you have any other conversations with Mr. Switzer around that time? A. Well, yes, I had numerous conversations with him. Around that time, after the levy had been placed on the goods, he told me that he had obtained a station wagon from a friend, a gentleman I also knew, a Herman Lipson, and that we were to begin packing the merchandise which was ours or which was to be bought in at the sale. And we began to pack merchan-

dise and put the more valuable merchandise into certain cartons which were earmarked as being more valuable, and a day or two before the sale——

Q. Is that before the sale? A. Yes, sir—a day or two before the sale we took the merchandise into the station wagon and I, Switzer and Faskow drove out to the home of Herman Lipson.

Q. Where was the home of Herman Lipson? A. On Harrow Street in Forest Hills.

Q. When you say you put the merchandise in a station wagon, what merchandise are you speaking of? (476) A. I am referring to the merchandise which we had originally packed, the merchandise which was the better or more valuable merchandise.

Q. What, if anything, did you do when you got to the home of Herman Lipson? A. When we got to the home of Herman Lipson we took the merchandise out of the station wagon and put it into the attic and the cellar of his home.

Q. What did you do with the station wagon? A. Well, I returned the keys to Lipson, and Switzer at that time had his car and he drove me to the station and I went home that night.

Q. Did you have a conversation with Mr. Switzer at the time that he drove you to the station? A. Yes, at the time that he drove me to the station he took out two of the cartons from the merchandise which were the most valuable and he said that he was taking them for safekeeping; he didn't want to leave them at Lipson's house and he would dispose of them himself.

Q. Where did he put these two cartons? A. Into the trunk of his car.

Q. Did there come a time when a sale was held at the

assets of Berkeley Jewelers, Inc.? (477) A. Yes, sir. It was on January 28, 1950, that a sale was held.

Q. Was this before or after the transaction at Mr. Lipson's home? A. After.

Q. Do you recall the time of day that the sale took place? A. I know that it was in the morning. When I came to the sale I was informed by Switzer that it was already over.

Q. What day of the week was it? A. It was on a Saturday.

Q. You say you had a conversation with Mr. Switzer when you got there after the sale was over? A. Yes, when I arrived at the premises, at the loft, and I saw a number of people there, I went over to Switzer and he told me "It's all over. The merchandise has been bought in."

Q. What, if anything, did you do after that? A. Well, after that there was some more packing to do and we took another load of merchandise in the same station wagon.

Q. When you say "we," whom do you refer to? A. I refer to Switzer, Faskow and myself put (478) another load of merchandise into the station wagon with Lipson and, once again, drove out to his home.

Q. Did you recognize anyone at the premises of the Berkeley Jewelers when you got there on the day of the sale? A. Well, yes, in addition to Switzer I recognized Faskow was present and Mintz was there, and there were a number of other people that I didn't know.

Q. Now, after you delivered this station wagon load of merchandise to Herman Lipson's home on the day of the sale, what, if anything, did you do after that on that day? A. Well, it was either on that day or the following day that we took another load, a smaller load, out to the home

of a friend of mine, Leonard Cohen, because there wasn't sufficient room in the home of Lipson at the time. He lived at that time on Fresh Meadows Lane in Long Island.

Q. Now, what type of merchandise was removed to the homes of Herman Lipson and Leonard Cohen on these occasions? A. It was the less bulky and more valuable merchandise, consisting of watches, Masonic rings, small clocks, some razors and fountain pens and merchan-
(479) dise of that type.

Q. Do you know what happened to the rest of the merchandise that was on the premises of Berkeley Jewelers, Inc.? A. I do know, mainly from what Switzer told me, that he had hired several trucks to deliver merchandise to various lofts throughout the city, one of which was the loft of National Plastikwear, another was Greenpoint Table, and there were one or two other places throughout the city where the more bulky merchandise was taken.

Q. Did this new corporation, Berkeley Pennsylvania Corporation, engage in business after the sale? A. Yes, sir.

Q. Do you know a man named Bernard Kwartin? A. Yes, sir. Bernard Kwartin is an uncle of mine.

Q. What is the business of Bernard Kwartin? A. He is a singing teacher.

Q. Was there any time when Mr. Kwartin advanced moneys to the Berkeley Jewelers, Inc.? A. Yes. It was in July of 1949. Mr. Kwartin at that time advanced $3,000 to the Berkeley Jewelers.

Q. Was that a loan? (480) A. That was a loan, yes, sir.

Q. Was there any interest on the loan? A. Yes, there was interest on the loan at 2 per cent a month for three months. It was a three-month obligation.

Q. Now, do you know whether that loan was repaid by Berkeley Jewelers, Inc.? A. No, the loan wasn't repaid by Berkeley Jewelers.

Q. Did Mr. Kwartin receive any money on account of that loan from any source? A. Yes. After the formation of the new corporation, Berkeley Pennsylvania, I spoke to Switzer at that time telling him that I felt not only morally obligated but I wanted to see that my uncle was paid off, and he arranged for the Berkeley Pennsylvania to issue checks which were paid to Kwartin in the amount of $50 a week, and the payments ran for a total of about $800. That was paid to Kwartin directly from the Berkeley Pennsylvania.

Q. Had Mr. Kwartin loaned any money to the Berkeley Pennsylvania Corporation? A. No, sir.

Q. Do you know what happened to the merchandise (481) that was taken to the home of Herman Lipson and the merchandise that was taken to the home of Leonard Cohen? A. Yes, sir. Most of the merchandise was sold. A certain amount was sold by me. Some was disposed of by Herman Lipson. Some was disposed of by Morris Switzer.

Q. Did there come a time when any particular sale of this merchandise was held? A. Yes, there was a time—I was not present—at which Herman Lipson sold merchandise to various people within the neighborhood in the form of a regular sale, a private sale in the area.

Q. Did you have a conversation with anyone about this sale? A. Yes. I had a conversation with Switzer about it.

Q. Was that before or after the sale? A. Oh, this was after the sale.

Q. Would you tell us what you said to him and what he said to you on that occasion? A. Well, at the time that

we were speaking, we (482) went on the assumption that the merchandise was——

Mr. Stim: I move to strike out what he went under. I want him to give the conversation.

The Court: Tell us what you said to Mr. Switzer and what he said to you.

A. Well, Switzer said, "This merchandise is ours and we are disposing of it, and this is in repayment of the debt which was incurred by Berkeley Jewelers to Bucknell Trading Corporation.

Q. Did there come a time when you received certain proceeds of that sale? A. Yes, sir, throughout the early part of 1950 I received proceeds from the sale of the merchandise.

Q. Do you know what portion of the proceeds of that sale you received? A. Of that particular sale I received two-thirds of the proceeds.

Q. Do you know what happened to the other one-third of the proceeds of that sale? A. Well, since Switzer was sharing in the profits of our company Switzer retained one-third for himself.

Q. What about the merchandise at the home of Leonard Cohen? (483) A. All of the merchandise, as far as I can remember was ultimately disposed of and the merchandise at Cohen's home was also disposed of.

Q. You mentioned that you sold some of this merchandise yourself. To whom did you sell it? A. I sold merchandise myself to various individuals in small amounts and I also sold merchandise to a shop on Park Row, a so-called jewelry pawnshop. I sold certain watches and certain rings to that store at the time.

Q. Do you know what happened to the merchandise which you have testified that Mr. Switzer took to his own home? A. Well, I know that it was sold. He told me that he was selling merchandise bit by bit.

Q. Did you receive any part of the proceeds of that merchandise? A. Yes, I received a few hundred dollars.

Q. Did that represent the entire proceeds? A. I can't recall what it represented but it seemed to me to represent less than what was taken at the time.

Mr. Stim: I move to strike it out, your Honor.

(484)

The Court: Sustained.

By Mr. Schwartz:

Q. Did there come a time, Mr. Schulman, when you were contacted by agents of the FBI? A. Yes, sir.

Q. Can you tell us when, approximately, that was? A. It was approximately a month or two after the sale was held, which would have been in March or April of 1950. The contact——

Mr. Stim: I object.

The Court: You say you were contacted by the FBI in March, 1950. Go ahead.

Q. How did that come about, sir?

Mr. Stim: I object to that, your Honor.

The Court: Sustained.

Q. Did you have a conversation with anyone about that?

Mr. Stim: I object to that, your Honor. It is after the conspiracy.

The Court: You mean prior to the time the FBI contacted him did he talk to anybody?

Mr. Schwartz: Either prior to or subsequent to, your Honor.

The Court: I want to find out what you are (485) asking so that I can rule. Put your question.

By Mr. Schwartz:

Q. How did you first learn that the FBI wanted to speak to you?

Mr. Stim: I object to that.

The Court: Overruled.

By the Court:

Q. Did somebody tell you that the FBI was looking for you? A. Yes.

Q. Who was it? A. Switzer told me that the FBI had called and wanted to speak to me, wanted to speak to Switzer's and wanted to speak to Irving Shear, who was Switzer's brother-in-law.

By Mr. Schwartz:

Q. Did you have a conversation with Mr. Switzer at that time? A. Yes, sir, I did.

Q. What did he say to you? A. He told me under no circumstances to discuss anything with the FBI and just to stay away from them.

Q. Did there come a time, Mr. Schulman, when you were subpoenaed to appear as a witness before the grand jury? (486) A. Yes, there came a time.

Q. Who gave you the subpoena? A. Switzer actually gave me the subpoena the night before I was to appear at the grand jury.

Q. Did you have a conversation with Mr. Switzer?

Mr. Stim: I object. It is not responsive. A subpoena from the grand jury Switzer gave to him?

The Court: That is what he says.

A. Yes, sir.

Q. Did you have a conversation with Mr. Switzer at that time? A. Yes. I asked him when the subpoenas had been left in the office because there was one for him also, and he told me, "Oh, some time ago."

And I asked him why he gave it to me now, at the very last minute just prior to my appearance. He said, "Oh, there is nothing at all to be concerned about. Nothing at all to be concerned about."

Q. Have you stated the full conversation that you had with Mr. Switzer at this time? A. No. I was concerned.

Mr. Stim: I move to strike it out, your Honor.

The Court: What harm is there? He was (487) concerned. It is perfectly obvious he must have been concerned.

Mr. Stim: Your Honor is right.

By the Court:

Q. What did he say to you and what did you say to him? A. I asked him what this whole thing was about.

Q. When did this occur? A. The night before.

Jack Shulman—for Government—By the Court

Q. The night before you were to appear before the grand jury, the night that you say he gave you the subpoena? A. Yes, sir.

Q. Tell us what he said and what you said. A. I asked him what this was all about, and he told me that there was nothing to be worried about; that this was an appearance before a grand jury and it didn't in any way deal with me, that I was in no way involved.

I asked him further what did this thing deal with, and he said, "Oh, I think they are trying to get Faskow on a false financial statement."

I said to him, "Will there be any mention of the sale of merchandise which had been held at (488) that time," two or two and a half years before that.

He said to me, "Well, I don't think so, but if there is you don't mention anything about it and say that you know nothing at all about this sale."

By Mr. Schwartz:

Q. Is that the full conversation that you had with Mr. Switzer on this occasion? A. Yes, sir.

Q. Did you subsequently testify as a witness before the grand jury? A. Yes, sir. I did.

Q. Did you testify truthfully? A. No, sir.

Mr. Schwartz: May I have these two documents marked for identification?

(Marked Government's Exhibits 10 and 11 for identification.)

Mr. Schwartz: Mr. Stim, will you stipulate that Government's Exhibits 10 and 11 for identification are the official records taken from the files of the clerk of the County of New York?

Mr. Stim: I will so stipulate.

Mr. Schwartz: I offer them in evidence.

Mr. Stim: No objection.

(489)

(Government's Exhibits 10 and 11 for identification received in evidence.)

Mr. Schwartz: May I summarize Government's Exhibits 10 and 11 for the jury?

The Court: Yes.

(Mr. Schwartz reads from Government's Exhibits 10 and 11 to the jury.)

By Mr. Schwartz:

Q. Mr. Schulman, I show you Government's Exhibit 11 in evidence and I ask you, does that refresh your recollection as to the holders of the stock of the Bucknell Trading Corporation at any time?

Mr. Stim: Your Honor, I object to that. He did not testify that he needs anything to refresh his recollection. He testified directly. He was the sole stockholder. He is asking him now to refresh his recollection. There is no conflict about what he said.

The Court: Maybe there will be. Overruled. Go ahead.

A. I was the sole common stockholder, but Bernard Kwartin, whom I referred to before, who is my uncle, was issued shares of preferred stock for $10,000 which he advanced to the corporation.

(490)

Q. Did that preferred stock have the right to vote? A. No, it was non-voting.

Mr. Schwartz: I have no further questions.

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(539) • • •

JACK GOLDBERG, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What is your business or occupation? A. Commercial financing.

Q. What is the name? A. Crown Factors.

Q. Is that a sole proprietorship, corporation, or partnership? A. A partnership with my dad.

Q. What is your father's name? A. Hyman.

Q. Where does Crown Factors do business? (540) A. 110 West 34th Street, New York City.

Q. How long has Crown Factors been in the commercial financing business? A. Twenty-some-odd years.

Q. How long have you been associated with that business? A. About 13 years.

Q. Do you know a man named Morris Switzer? A. I do.

Q. Do you see Morris Switzer anywhere in this courtroom? A. I do.

Q. Will you point him out, sir? A. He is sitting there.

Mr. Stim: We concede.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer?

The Court: Yes.

Q. How long have you known Mr. Switzer, sir? A. Oh, since about 1940's, in the early '40s.

Q. Was there a time when Crown Factors shared office space with Morris Switzer? A. We were in the same suite of offices with him. He was the landlord at the time in this other suite (541) of offices. We paid rent to him.

Q. Where was that office located? A. 1451 Broadway.

Q. And between what dates were you in the same suite of offices with Morris H. Switzer? A. Well, approximately 1941 or 1942 until about 1948 or 1949. I am not exactly sure of the exact dates.

Q. Was there any business relationship between Crown Factors and Morris H. Switzer during that time?

Mr. Stim: I object to that. It is not within the purview of this indictment.

The Court: What is the question?

Q. Was there any business relationship between Crown Factors and Morris H. Switzer during this time?

The Court: I will allow it.

A. He was our attorney.

Q. Was there any other business relationship between Crown Factors and Morris H. Switzer?

Mr. Stim: I object to that, your Honor.

The Court: Sustained.

Q. Did there come a time when Mr. Switzer obtained business for Crown Factors, Inc.?

Mr. Stim: I object to that, your Honor.

(542)

The Court: Sustained.

By Mr. Schwartz:

Q. How was Mr. Switzer compensated for his services to Crown Factors as an attorney?

Mr. Stim: I object to that.

The Court: Sustained.

Q. Do you know a man named Albert Faskow? A. I do.

Q. Did you know him in the years 1948 and 1949? A. I did.

Q. Who introduced you to Albert Faskow? A. Mr. Switzer.

Q. Do you know what Albert Faskow's——

Mr. Schwartz: I withdraw that.

Q. When did Mr. Switzer introduce you to Albert Faskow? A. I don't know the exact date when.

The Court: What year, what month? As near as you can.

A. Well, I would have to look in my records to be able to show. I wouldn't be able to give you a date or a year.

The Court: Do you have the records with you? (543)

The Witness: No.

The Court: Do you think it would be 1948?

The Witness: I would be guessing, your Honor, because he introduced me. What year I don't know.

Mr. Stim: We will concede that he introduced him either in 1948 or 1949. 1948.

The Court: All right.

By Mr. Schwartz:

Q. Do you know what Mr. Faskow's business was at this time? A. Yes.

Q. What was his business? A. He was with Berkeley Jewelers, a sort of a discount house or gift ware.

Q. Was that a corporation? A. Yes, sir.

Q. Now, at the time that you were introduced to Mr. Faskow, did you have a conversation with anyone? A. I don't understand the question.

The Court: At the time you met Mr. Faskow through Mr. Switzer, did you have a conversation?

The Witness: Yes.

Q. Who was present at that conversation? (544) A. Well, I couldn't recollect. That was probably my dad, Mr. Switzer, Mr. Faskow and myself.

Q. Would you state for the Court and jury what the conversation was? A. Well, Mr. Switzer introduced Mr. Faskow to us, meaning my dad and I, whether we wanted to do business with Mr. Faskow or Berkeley Jewelers, as he brought it to us, and at that time he explained the transaction to us and we did do business with them.

Q. Did you make loans to Berkeley Jewelers, Inc.? A. We made several transactions with them.

The Court: By "transactions," you mean a loan, do you not? You advanced money to him?
The Witness: Yes.

By Mr. Schwartz:

Q. Did you advance money to them in the year 1948? A. Yes, sir.

Q. And in the year 1947? A. Well, my records—I don't have my records with me, Mr. Schwartz.

Q. You were introduced to Mr. Faskow in 1948? A. Yes.

(545)

Q. That introduction was by Mr. Morris Switzer? A. Yes.

Q. Following that introduction you made loans to Berkeley Jewelers, Inc.? A. Yes.

The Court: You made more than one?
The Witness: Yes.

By Mr. Schwartz:

Q. Now, did Mr. Switzer have any part in the consummation of these various loan transactions? A. He usually drew up the papers.

Q. Was he compensated for his services in that connection? A. Yes, sir.

The Court: You mean he was compensated by Crown?

The Witness: Well, he was paid for doing our legal work.

The Court: He was paid by you?

The Witness: He was paid by us, yes.

Q. Did Mr. Switzer perform similar legal work for other accounts of Crown Factors? A. Yes, when the occasion arose.

Q. Was his legal fee the same on every transac- (546) tion?

Mr. Stim: I object to that, your Honor.

The Court: Were the fees that he received on the Faskow loans the same in percentage as they were on other loans?

The Witness: There was never a set amount of fee of what the agreement would be. We didn't have a running contract.

The Court: Each one was——

The Witness: He negotiated with my father how much he would get for a particular agreement.

By Mr. Schwartz:

Q. In connection with these negotiations what factors were taken into consideration?

Mr. Stim: I object to that.

The Court: Overruled.

The Witness: Well, they never had a set price on any particular agreement.

Jack Goldberg—for Government—By the Court

The Court: Was the amount of the loan a factor in determining how much Mr. Switzer would get?

The Witness: Yes.

The Court: Was the amount of the loan a factor in determining the fee that Mr. Switzer would get when he drew up papers for other loans, to people other (547) than Faskow?

The Witness: It was always a factor.

The Court: It was always a factor?

The Witness: Yes.

The Court: All right. We will take our recess.

(Recess taken until 2:15 p. m.)

AFTERNOON SESSION

(2:15 p. m.)

JACK GOLDBERG, resumes.

Direct examination continued by Mr. Schwartz:

Q. Mr. Goldberg, were there any other factors that went into the determination of the fees paid to Mr. Switzer on this business? A. Well, usually who recommended the customer to us.

Q. How did that affect the fee paid to him? A. Well, usually when Mr. Switzer recommended the client to us, he usually got a little more on drawing up the legal matters.

Mr. Stim: I can't hear him, your Honor.

The Court: He said if Mr. Switzer recom- (547 a)

mended a client he usually got paid a little more than just for drawing up the papers.

Q. Now, was the Berkeley Jewelers an account recommended by Mr. Switzer? A. Yes, sir.

Mr. Schwartz: No further questions.

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(554)

Sam Mintz, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What is your business? A. I am a fur broker.

Q. How long have you been in the fur brokerage business? A. About 20 years.

Q. Were you ever engaged in any other business? A. Finance business.

Q. When were you in the finance business? A. From 1929 right up to 1935 and about 1936 to 1951.

Q. Were you in the finance business in the years 1948, 1949 and 1950? A. I was.

Q. Did you have an office from which you conducted that business? A. That is right.

Q. Where was your office? A. 307 Seventh Avenue.

Q. Did you have any associates in that business with you? (555) A. I shared space with Mr. Fellerman, Jack Fellerman, in 307 Seventh Avenue, Room 201.

Q. Did you have any other relationship with Mr. Fellerman during that period? A. In finance deals once in a while.

Sam Mintz—for Government—Direct

Q. Have you ever been convicted of a crime, Mr. Mintz? A. I was.

Q. What crime? A. I think back in 1921, I think it was, for simple assault or something like that.

Q. Were you ever convicted of violation of the usury laws? A. I was.

Q. When was that, sir? A. 1935.

Q. Do you know a man named Morris Switzer? A. I do.

Q. Do you see Morris Switzer anywhere in this courtroom? A. Yes.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer?

The Court: Very well.

(556)

By Mr. Schwartz:

Q. How long have you known Mr. Switzer? A. About 14, 15 years.

Q. What is Mr. Switzer's business? A. Lawyer.

Q. Was there ever a time when he represented you as an attorney? A. Once or twice.

Q. Do you know a man named Albert Faskow? A. I do.

Q. When did you meet Albert Faskow? A. The first time through Mr. Morris Switzer.

Q. When? A. In 1948.

Q. What month in 1948? A. I think it was October.

Q. Do you know what Mr. Faskow's business was at that time? A. He was in the jewelry business and sold radios and television and all that.

Q. Do you know what the name of his business was? A. Berkeley Jewelers.

Q. Was that a corporation? (557) A. Yes, it was.

Q. Do you know what office Mr. Faskow held in that corporation? A. I think he was the president.

Q. Now at the time that you were introduced to Mr. Faskow, did you have a conversation with him? A. I had a conversation with Mr. Switzer.

Q. Was that over the telephone or in person? A. Over the telephone.

Q. Tell the Court and jury what Mr. Switzer said to you and what you said to Mr. Switzer. A. Mr. Switzer called me on the telephone and he asked me if I would give the Berkeley Jewelers a loan of $2,000. I didn't know Mr. Faskow at that time, and he says he would endorse the implement, the check, and it was to be for a month. So I come—he gave me the address of Mr. Faskow.

Q. Was that the full conversation—wait a minute. You say he gave you the address of Mr. Faskow? A. Yes; he said he needed $2,000.

I said, "I will bring up the $2,000," and I made an appointment to be at Berkeley Jewelers.

Q. When? A. In October, 1948.

(558)

Q. Was that the same day? A. That's right.

The Court: Was it in cash?

The Witness: In cash.

By Mr. Schwartz:

Q. Did you discuss with anyone the interest on this loan? A. Mr. Switzer.

Q. What did you say or what did he say? What was the conversation about the interest? A. He wanted $2,000 for a month and he would pay 10 per cent for the month.

Q. Did that terminate it?

The Court: Who was it that said that?

The Witness: I spoke to Mr. Switzer on the telephone.

The Court: When you say "He wanted" the $2,000.

The Witness: That is for Berkeley Jewelers would pay 10 per cent for the loan.

Q. Is that the full conversation? A. The check would be made out to Mr. Switzer, endorsed by Mr. Switzer.

Q. Did that end the conversation? (559) A. That is right.

Q. Now, what, if anything, did you do after this telephone conversation? Did you have anything— A. I went to Berkeley Jewelers.

Q. Did you have anything with you? A. $2,000 in cash.

Q. Whose money was this $2,000 in cash? A. It was half mine and half Mr. Fellerman's.

Q. Jack Fellerman? A. Jack Fellerman, an associate in this here deal.

Q. Did you have a conversation with Mr. Fellerman about this? A. I did.

Q. When did you have this conversation with Mr. Fellerman? A. After I spoke to Mr. Switzer.

Q. What did you say to Mr. Fellerman and what did Mr. Fellerman say to you? A. I said, "I am making a loan to Berkeley Jewelers. I don't know Berkeley Jewelers but Mr. Switzer says he will endorse the check and he says he will go in on the deal with me," and he gave me $1,000 and I had $1,000. I had $2,000.

(560)

Q. Did you discuss the interest with Mr. Fellerman? A. Yes, and I discussed it with Mr. Switzer on the telephone before I came down with the money.

Q. Now what did you do after you spoke to Mr. Fellerman? A. He gave me $1,000 and I had $1,000, and I went down to see Mr. Switzer and Mr. Faskow.

Q. Where did you go to see them? A. 29th Street near Fifth Avenue and Madison Avenue.

Q. What was the place? What place was that? A. That was on the first floor. They sold jewelry and I seen all that stuff, radios.

Q. Was that the store of Berkeley Jewelers, Inc.? A. It was on the first floor. It was a store and I met him in the office.

Q. What happened there? A. Well, he introduced me to Mr. Faskow and they made out the check. I gave them the $2,000. He told me to hold the check for a month.

Q. I show you Government's Exhibit 2 in evidence, a check for $2,200, and ask you what that is? (561) A. This is the check I received after giving the $2,000.

Q. I call your attention to the endorsement on the back of that check. Who made that endorsement? A. Mr. Switzer.

Q. Was that the only money you loaned to Berkeley Jewelers, Inc.? A. Well, two weeks later I loaned them another $2,000.

Q. How did that come about? A. The same conversation.

Q. You had a conversation with someone? A. Mr. Switzer. And I brought down the $2,000 and made out——

Q. Just a moment. You had a conversation with Mr. Switzer? A. I did.

Q. What did Mr. Switzer say to you and what did you say to Mr. Switzer? A. He said Mr. Faskow would need $2,000—rather, the Berkeley Jewelers, for a month or maybe a little longer, because the Christmas holidays were coming along, they weren't too far away.

So I spoke to Mr. Switzer and I told him— (562) he asked me if I could get him $2,000. I spoke to Mr. Fellerman and we agreed to bring down the $2,000. We met Mr. Switzer and Mr. Faskow.

Q. What was the interest to be on this? A. The same thing as the other one—10 per cent.

The Court: A month?

The Witness: A month.

Q. Mr. Mintz, I show you Government's Exhibit 3 in evidence, consisting of two checks, and ask you what those checks are? A. Those are the two checks of the $2,000, made $1,100 each.

Q. To whom are they made out? A. Morris Switzer.

Q. I call your attention to the endorsements on the backs of those checks. A. Morris Switzer.

Q. Now, were these loans repaid during 1948? A. They were not.

Q. They were or they were not? A. They were not.

Q. They were not? A. They were not.

(563)

Q. Were these loans repaid during 1949? A. They were not.

Q. Was interest paid on these loans? A. They were.

Q. For how long a period was interest paid? A. Until up to almost December, 1949.

Q. Would that be between October, 1948, and December, 1949, sir? A. That is right.

Q. And at what rate was that interest paid? A. It was 10 per cent, and later on I made it less.

Q. Well, at 10 per cent that would be $400 a month? A. That's right.

Q. There came a time, you say, when you reduced that? A. I reduced that.

Q. To how much? A. I don't know how much. It was much less. I know that.

Q. I show you Government's Exhibit 4 in evidence and I ask you what the checks comprising that exhibit are? (564) A. That would be interest on the $4,000.

Q. Looking at those checks, does that refresh your recollection as to the period of time when you were charging 10 per cent a month? A. Well, there were times he would give us cash, and on some occasions he would come up with a bigger check and I would give him some change for it. These checks were for interest.

Q. And you say in addition to these checks there were also cash payments on occasion? A. Occasionally, yes.

Q. And those cash payments represented interest? A. Interest.

Q. I show you Government's Exhibit 5 in evidence, consisting of a number of checks, and ask you what those checks are? A. They might have been the loan in between that he paid off, maybe a thousand or something like that which he paid out.

Q. Will you tell us what these checks represent? What do the amounts of these checks represent? A. Most of them are interest checks.

Q. On what? (565) A. On the loan of $4,000.

Q. Are there any exceptions to that? A. I wouldn't know. They are so far back. I wouldn't know exactly what which check represents now, but most of them were interest checks. They must be interest checks.

Q. How much did the checks total in Government's Exhibit 4 in evidence? A. $1,200.

Q. How much do the checks total in Government's Exhibit 5 in evidence? A. $1,750.

Q. You say in addition to these checks there was cash? A. Very few, not too much.

Q. How did you go about collecting this interest, Mr. Mintz? A. I would call up Mr. Faskow on the due date and ask him whether I should put in the checks. He said, "Don't put them in, I will give you the interest."

Q. On those occasions did he give you the interest? A. He did.

(566)

Q. To you personally? A. To myself or Mr. Fellerman.

Q. Did there come a time when Mr. Faskow failed to make his payment of interest? A. Yes.

Q. When was that, sir? A. That was in December of 1949.

Q. What did you do about that? A. I called up Mr. Faskow and——

Q. You had a conversation with him? A. I had a conversation with Mr. Faskow. He told me he wasn't doing good and he couldn't pay me right now.

Q. Then what did you do? A. I called up Mr. Switzer. I asked Mr. Switzer——

Q. Did you have a conversation with Mr. Switzer? A. Yes.

Q. What did you say to him and what did he say to you? A. I told Mr. Switzer that Mr. Faskow did not pay me the interest, and he told me not to worry, he's got his endorsements on the checks and I would be protected.

(567)

Q. Who will be protected? A. We will, with the $4,000.

Q. Who are "we"? A. Mr. Fellerman and myself.

Q. Did there come a time when Mr. Switzer came to your place of business? A. Yes, sir. He did.

Q. When was that, sir? A. That was maybe a week after that.

Q. *Did you have a conversation* with him at that time? A. I did.

Q. Will you tell us what the conversation was? A. He told me that Berkeley Jewelers were in bad shape and I said, "How am I going to get my money?"

He said, "Don't worry about the money." He told me he will get me a confession of judgment. He will get a confession of judgment made out to Mr. Fellerman and we will run the sale and that is how I will get my money out.

Q. What did you say to that? A. I said, well—I mean, after I came up with Mr. Chasin——

Q. Who is Mr. Chasin? (568) A. He is supposed to be related to Mr. Switzer.

Q. What did Mr. Chasin do for a living? A. He is a lawyer.

Q. And did you have a conversation with these men when they came to your office? A. Mr. Switzer introduced Mr. Chasin to us and he says "He will be your attorney and we will sign the confession of judgment."

Q. Were any papers signed? A. There were papers signed.

Q. By whom? A. Mr. Fellerman.

Q. Did there come a time thereafter when you received a telephone call? A. That was on a Friday.

Mr. Stim: When was that, about?

The Witness: Friday was the month of—I don't know what month it was. In 1950.

Q. Was it early in the year or late in the year? A. It must have been about February or March. I don't know exactly. It might have been in March, sometime around that. I got a call on a Friday I should bring down $1,500.

Q. From whom did you receive this call? A. Mr. Switzer.

(569)

Q. Did you have a conversation with him? A. Yes, sir.

Q. What did Mr. Switzer say to you and what did you say to Mr. Switzer? A. Mr. Switzer told me there will be an auction at 29th Street at 10 o'clock on a Saturday; I should bring down $1,500.

Q. Cash or check? A. In cash.

Q. Where should you bring it? A. To Mr. Berkeley, Berkeley Jewelers.

Q. When? A. On a Saturday. That was the following day.

Q. Did you do that? A. I did.

Q. Where did you go that Saturday morning? A. I went to Berkeley Jewelers. The place was closed and I was waiting downstairs.

Sam Miat:—for Government—Direct

Q. Did there come a time that you met a number of people there? A. I did.

Q. When was that? A. Saturday morning, about 10 o'clock.

Q. Whom did you recognize there, if anyone? A. Mr. Chasin, Mr. Switzer.

(570)

Q. Was there anyone else there? A. There was about four or five other people which I don't know. I never seen them before.

Q. Did you have a conversation with anyone at that time? A. No. It was a cold morning, waiting to open up the place.

Q. Did there come a time when the place was opened? A. Yes.

Q. Did you have a conversation with anyone at that time? A. After the place was opened the auctioneer there, and——

Q. What, if anything, did you do with the $1,500? A. I gave the $1,500 to Mr. Switzer, Mr. Chasin was standing there.

Q. Did you have a conversation with anyone at that time? A. Not much of a conversation.

Q. Did there come a time when a sale was held there at Berkeley Jewelers, Inc.? A. There was.

Q. When was that? A. That was about a few minutes after I was (571) there.

Q. Who conducted the sale? A. The auctioneer.

Q. Did you know the auctioneer? A. I did not.

Q. Will you tell the Court and jury what happened when the sale started, what did the auctioneer do? A. The auctioneer started. I bid for one side and all of a sudden

there was three people, three or four people, strangers, and they wanted to buy, you know, and somebody says it looked like it was trouble.

Q. Who said that? A. Either Chasin or Switzer or Faskow. I don't know who was there. One of them said, "It looks like trouble".

Q. What, if anything, happened then? A. Well, all of a sudden the three people disappeared in the back. There was Faskow in the back. Mr. Switzer went in the back and that is all I remember. And later on they disappeared.

Q. Who disappeared? A. The three people that were bidding.

The Court: The strangers?

(372)

The Witness: Yes.

By Mr. Schwartz:

Q. Then what happened? A. Then the sale went on and they sold the whole thing in bulk.

Q. How many bids were there?

The Court: To whom?

The Witness: To me.

The Court: Had you made a bid?

The Witness: Yes.

The Court: What did you bid?

The Witness: I think $1,100 or $1,200, something like that. $1,140, something like that. I think $1,200.

Q. How many bids were made after the strangers left? A. It was the only bid, my bid.

The Court: It was knocked down to you?
The Witness: Yes.

Q. Did you have a conversation with anyone at the time that this was knocked down to you? A. After it was knocked down to me Mr. Switzer asked me, "Whose name do you want the sale on?" Whether I want it on my name or Fellerman's name or (573) his brother-in-law or some relative.

I says, "It make no difference," if he made it in his brother-in-law's name or his nephew. I think his name is Shear.

Q. Shear? A. Yes. I think that is the name it went on.

Mr. Stim: Will the record show that this Shear is not the same Scher we are talking about in Palace Gift.

The Court: I don't know who it is.

Mr. Schwartz: The Government will concede that this is Irving Shear, and the principal in the Gift Palace is Milton Scher.

By Mr. Schwartz:

Q. Now, then, did you receive any receipt for the money? A. I did not.

Q. Did anyone receive a receipt for the money? A. The only thing I received was a check for about $1,140 or $1,200, and the other, the rest of the money, was for expenses.

Q. For expenses? A. Yes.

(574)

Q. Now you had given Mr. Switzer $1,500? A. That is right.

Q. And do you recall how much you bid for the merchandise? A. I think $1,100 or $1,200. I don't know exactly how much.

Q. Was there a separate bid for the fixtures as well? A. Altogether. Altogether it was $1,100 or $1,200—$1,140.

Q. Was it less than the $1,500 you had given Mr. Switzer? A. Yes.

Q. Did you receive any money back from that aside from the check that you received? A. No, I did.

Q. When did you receive this check? A. I think the following week.

Q. From whom did you receive it? A. From Chasin.

Q. For how much was this check? A. I think it was $1,100—over $1,100. I don't know what it was. $1,100 or $1,200.

Q. Now have you told us all the conversation (575) you had with anyone at the sale? A. After the sale I walked out. After that I said, "What is going to be with the merchandise?"

He said he is going to put it away.

Q. Who said that? A. Mr. Switzer says he will put it in the store after or somewheres and sell it and that is the way I will get my money, because he endorsed the check and I wanted the money on account of his endorsement.

Q. Did there come a time when you were subpoenaed to testify as a witness before the grand jury? A. Yes, sir.

Sam Mintz—for Government—Direct

Q. Who gave you your subpoena? A. It was brought up to me.

Q. Did you have a conversation with anyone about that? A. I called up Mr. Switzer and I told him I got the subpoena, and I met Mr. Switzer in his office.

Q. What did Mr. Switzer say when you called him up? A. He says, "Come up to see me." He says, "I will meet you in the candy store and we will have a cup of coffee."

(576)

Q. Did you go to the candy store? A. I did.

Q. Did there have a conversation with Mr. Switzer? A. I did.

Q. What did Mr. Switzer say to you and what did you say to Mr. Switzer? A. Mr. Switzer wanted me to say I put pressure on him, so that is the reason he forced the sale, to make the sale.

Q. Was that so? A. No.

Q. Did you thereafter testify before the grand jury? A. I did.

Q. Did you tell the truth before the grand jury? A. At first I didn't.

Q. Did there come a time when you changed your testimony before the grand jury? I did.

Q. And that second time, did you tell the truth? A. The second time I did.

Q. Did you have any other conversation with Mr. Switzer about your testimony before the grand jury? (577) A. That is all.

Mr. Schwartz: No further questions.

* * * *

(588) • • •

JACK FELLERMAN, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What is your business, Mr. Fellerman? A. I am doing fur jobbing and selling.

Q. Where is your office? A. 307 Seventh Avenue.

Q. How long have you been in this business, the fur brokerage and jobbing business? A. About three years.

Q. Have you ever been engaged in the money lending business? A. Yes, sir.

Q. When was that, sir? A. 1948, 1949.

Q. Now at that time where was your office? A. 307 Seventh Avenue.

(589)

Q. Did anyone else occupy that office with you, sir? A. Yes, sir.

Q. Who? A. Mr. Mintz, Sam Mintz, and I had a furrier in front, Julius B. Kramer.

Q. Did you have any associates in the money lending business? A. Yes, sir.

Q. Who were your associates? A. Mr. Mintz.

Q. Mr. Sam Mintz? A. Yes, sir.

Q. Do you know a man named Morris H. Switzer? A. Yes, sir.

Q. Do you see Mr. Switzer anywhere in this courtroom? A. Yes, sir.

Q. Will you point him out, sir? A. Sitting right over there.

Mr. Schwartz: May the record show the identification of Mr. Switzer?

Q. How long have you known Mr. Switzer? A. About ten years.

(590)

Q. What is his business? A. He is an attorney.

Q. Was there ever a time that he represented you as an attorney? A. Yes, sir.

Q. When was that, sir? A. Oh, a good many years ago.

Q. Do you know a man named Albert Faskow? A. Yes, sir.

Q. When did you meet Mr. Faskow? A. Around 1948, 1949.

Q. At that time do you know what Mr. Faskow's business was? A. Yes, sir.

Q. What was his business? A. Berkeley Jewelers.

Q. Is that a corporation, sir? A. Yes, sir.

Q. Did he hold an office in that corporation? A. I guess so.

Q. What officer was he? A. I think he was the president.

Q. Who introduced you to Albert Faskow? A. Mr. Switzer.

(591)

Q. How did that come about? A. Well, he spoke to my associate, Mr. Mintz, about making a loan to Mr. Faskow, and they made the loan.

Q. Do you recall how much the loan was? A. I think it was for $2,900.

Q. Was that in cash or by check? A. That was in cash.

Q. Whose cash was it? A. Fifty per cent mine and 50 per cent Mr. Mintz'.

Q. Was that cash given to Mr. Faskow as president of

Berkeley Jewelers, Inc.? A. Well, Mr. Mintz went over there and he made the loan and he came back with the check.

Q. Did you have any conversation prior to the time that Mr. Mintz came back with the check; did you have any conversation with anyone about that loan? A. Well, Mr. Switzer spoke to Mr. Mintz about it.

Q. Was that in your presence? A. No, it wasn't in my presence.

Q. Did you speak to anyone about it? Did you speak to Mr. Mintz about it? A. Yes, sir.

(592)

Q. When was that? A. Oh, that was, I think, in October of 1948.

Q. What did Mr. Mintz say to you at that time and what did you say to him? A. He told me he was going to make a loan to Berkeley Jewelers for $2,000, and he told me if I wanted to take 50 per cent of it.

Q. How long a period of time was that loan going to be? A. For 30 days.

Q. What was to be the interest? A. Ten per cent: $200.

Q. Now I show you Government's Exhibit 2 in evidence and ask you what that is? A. That is a check that he gave Mr. Mintz for the $2,000 plus the $200 interest.

The Court: When you say "he" gave you the check, whom do you mean?

The Witness: Mr. Faskow.

By Mr. Schwartz:

Q. Did there come a time when you loaned additional money to Berkeley Jewelers, Inc.? A. Yes, sir.

Q. When was that? (593) A. That was about a month later.

Q. What was the first time you heard of that transaction? A. When Mr. Mintz came to me and told me he wanted me to lend him additional $2,000 and he asked me if I wanted 50 per cent of it.

Q. What were the terms of that loan? A. He gave us two checks for $1,100 each that he was going to pick up within 30 days.

Q. How much was the interest on that? A. The same thing, 10 per cent.

Q. I show you Government's Exhibit 3 and ask you what they are, these two checks comprising Government's Exhibit 3 in evidence? A. Those are the checks that Mr. Mintz got from Mr. Faskow of the loan.

Q. Were these two loans represented by the checks that I have shown you, Government's Exhibits 2 and 3 in evidence, ever paid? A. What is that?

The Court: Were they ever paid?

A. No, sir.

Q. Was interest paid on these loans? A. Yes, sir.

(594)

Q. For how long a period of time? A. Oh, about nine, ten months.

Q. Did you receive interest all through 1948 after the loan was made? A. Yes sir

Q. Did you receive interest all through 1949 after the loans were made? A. Well, I don't know if we received interest right up until the end of 1949. I couldn't tell you. I don't remember.

Jack Fellerman—for Government—Direct

Q. I show you Government's Exhibit 4 in evidence and ask you what the checks comprising that exhibit are? A. Yes, sir.

Q. What are they? A. These are interest checks, sir, from November 9, 1949.

Q. Is that on the two loans about which you have been testifying? A. Yes, sir.

Q. I show you Government's Exhibit 5 in evidence and ask you what the checks contained in that exhibit are? A. These are checks that he paid interest, Mr. (595) Faskow paid interest, and sometimes he asked me for cash, if I have $50 in cash or $75, and I would give it to him and he would give me a check for the full amount.

Q. Looking at these checks is your recollection refreshed as to the period during which Berkeley Jewelers continued to pay interest on these loans? A. Yes, sir.

Q. For how long did they continue to pay interest? A. Up until December 12, 1949.

Q. Now, were interest payments always made by check? A. I think so. I think most of the time it was made by check.

Q. Were there any occasions when cash was paid for interests? A. I don't think he paid the whole thing with cash, no, sir, at any time.

Q. Did he pay a portion of it? A. Yes, sir.

Q. To whom did Mr. Faskow pay these installments of interest? A. Well, sometimes he paid it to me and sometimes he paid it to Mr. Mintz.

(596)

Q. Did there come a time when Mr. Faskow failed to make an interest payment? A. Well, I think the last pay-

ment he only paid part of it. He didn't pay the whole payment.

Q. ~~When~~ was that? A. That was about December of 1949, I believe.

Q. Did you do anything about that, sir? A. Did I do anything? No, sir.

Q. Did you speak to anyone about that? A. Mr. Mintz took care of it. I asked him why he didn't pay.

Q. You had a conversation with Mr. Mintz? A. Yes, sir.

Q. What did you say to Mr. Mintz and what did Mr. Mintz say to you, sir? A. I don't remember it all but he said we will get paid and don't worry about it.

Q. Did you have any further conversations with Mr. Mintz about this Berkeley deal? A. No, sir.

Q. Did there come a time when you signed some papers in connection with this transaction? A. Yes, sir.

Q. To the best of your recollection, when was (597) that? A. Oh, that was—I believe it was at the end of 1949.

Q. Do you recall what kind of papers you signed at that time? A. Some kind of judgment papers.

Q. I show you Defendant's Exhibit R in evidence consisting of four confessions of judgment and ask you whether you have ever seen those papers before? A. Those papers, I don't remember if they were in my office or if Mr. Switzer had them. I couldn't answer. I don't remember.

The Court: Were those the papers you signed?

The Witness: I don see my signature on them, sir.

The Court: Were there any other papers that you signed?

The Witness: I can't remember that, sir. My signature isn't on there.

By Mr. Schwartz:

Q. I show you Government's Exhibit 8 in evidence and ask you whether you have ever seen those four notes before? (598) A. I don't remember these at all.

Q. You have never seen those before? A. I don't remember them, no, sir.

Q. Do you know a man by the name of Benjamin Chasin? A. Yes, sir.

Q. And what is Mr. Chasin's profession? A. He is an attorney.

Q. When did you first meet Mr. Chasin? A. When Mr. Switzer brought him up to my office and said he would represent me.

Q. When was that? A. Oh, it may have been the early part of January or it may have been the end of December.

Q. December, 1949, or January, 1950? A. Yes, sir.

Q. Now you say you had a conversation with Mr. Switzer at that time? A. All he said was that he would represent us there.

The Court: Where?

The Court: At some kind of sale or something.

Q. And did Mr. Chasin thereafter act as your (599) attorney? A. Yes, sir.

Q. In what connection did he act as your attorney.

sir? A. He represented us at the sale of the Berkeley Jewelers.

Q. Well, now, was there anything that you remember that happened prior to the sale at Berkeley Jewelers in which you were represented by an attorney? A. Will you repeat that, please.

Q. Prior to the time that there was this sale at Berkeley Jewelers, were you represented by Mr. Chasin? A. No, sir.

Q. Do you know what Mr. Chasin did for you as an attorney? A. No, sir, I don't know. He did business with Mr. Mintz there.

Q. You say that Mr. Chasin represented you in connection with a sale that was held with Berkeley Jewelers, Inc.? A. Yes, sir.

Q. And that was in the month of January, 1950, or late in December, 1949? (600) A. Yes, sir.

Q. Now, did you have a conversation with anyone about that sale at the time? A. I did not, no, sir.

Q. Did you discuss it with Mr. Mintz? A. No. Mr. Mintz just told me one day—he told, "There is going to be a sale at Berkeley Jewelers," and it was held on a Saturday. I didn't come into the office and he said he needed, I think he said, $1,500 to go to the sale and he asked me to put up half and he will put up half, and he went to the sale.

Q. Did you put up half of that $1,500? A. Yes, sir.

Q. Do you know if Mr. Mintz went to the sale? A. Yes, sir, he did go.

Q. Did you speak to him about that at any time? A. After the sale.

Q. After the sale? A. Yes, sir.

Q. What did you say to him and what did he say to you, sir? A. He told me that they bought in all the merchandise for $1,500 and that we wouldn't lose our money.

(601)

Q. Do you know in whose name the merchandise was bought? A. No, sir.

Q. Did there come a time when you received a check after the sale? A. Yes, sir.

Q. From whom did you receive the check? A. I think that check was from Mr. Chasin.

Q. Do you recall the amount, sir? A. It was in the neighborhood of $1,100.

Q. Did there come a time when you were subpoenaed to appear as a witness before the grand jury? A. Yes, sir.

Q. Did you have a conversation with anyone about that? A. Yes, sir.

Q. With whom did you speak about that subpoena? A. Mr. Mintz.

Q. What did Mr. Mintz say to you and what did you say to Mr. Mintz? A. Well, he told me what I would have to say.

Mr. Stim: Your Honor—never mind.

The Court: He told you what?

The Witness: He told me what I should say in (602) the grand jury and I said it, but I later went to the grand jury and took back that testimony and told the truth.

The Court: What it was you told the grand jury that was false?

The Witness: Yes, sir.

Benjamin H. Chasin—for Government—Direct

Mr. Schwartz: I have no further questions to ask of this witness.

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(604) * * *

BENJAMIN H. CHASIN, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What is your profession? A. I am an attorney.

Q. How long have you been admitted to the bar? A. Since December, 1932.

Q. Do you know a man named Morris H. Switzer? A. I do.

Q. Do you see him in the courtroom? A. Yes.

Q. Point him out? A. The gentleman in the middle, at the end table.

Mr. Schwartz: May the record show the identification of the defendant Switzer?

The Court: Yes.

Q. Are you a relation to Mr. Switzer? A. I am.

Q. What relation? A. First cousin.

Q. Do you know what Mr. Switzer's profession is? (605) A. He is an attorney at law.

Q. Do you know whether he was engaged in the practice of his profession during the month of January, 1950? A. To the best of my knowledge, yes.

Q. Do you know a man named Jack Fellerman? A. I do.

Benjamin H. Chasin—for Government—Direct

Q. Did there come a time when you received a telephone call from Mr. Fellerman? A. I did.

Q. When was that, sir? A. That was the latter part of January.

Q. In what year, sir? A. 1950, I believe.

Q. Did you have a conversation with Mr. Fellerman at that time? A. I did.

Q. Will you tell the Court and jury what Mr. Fellerman said and what you said at that time? A. Well, Mr. Fellerman told me that he had been told by Morris Switzer to call me up to ask me to represent him in a collection matter. I asked him how he came to me.

He said, "Well, Morris said that I should call (606) you."

I said, "Well, I will call Morris up and find out what it's about" and with that I hung up.

Q. What, if anything, did you do after that? A. I then communicated with Morris Switzer and told him that this man Fellerman had called me and had told me that he had told him—recommended him to me in a collection matter. And I asked Morris what it was about.

He told me that he represented Mr. Fellerman and he also represented, I believe, Berkeley Jewelers; that Mr. Fellerman had claims against Berkeley Jewelers and that he couldn't represent both sides; that he had confessions of judgment which he would like me to represent Fellerman in entering.

Q. Did he tell you who had prepared these confessions of judgment? A. Well, he did.

Q. Did he tell you how many of these confessions of judgment there were? A. There were four.

Q. And how much was each? A. $1,000 each.

Q. Is that the actual conversation? A. Well, after that

I told him that I would take (607) care of it and I said, "What about the papers?"

He said that he would get them over to Fellerman's if I would go over there and pick them up.

I also at that time spoke to him and said that I might have a problem with the marshal; I didn't know whether I could get one to go out and levy on the judgments as he requested me to do.

He asked me if I knew about a marshal on Madison Street, Adisky.

I said, "yes," I had heard of him.

He said, "Well, why don't you try him?"

I said, "Well, I will do that."

Q. What, if anything, did you do after that? A. I then, late that afternoon, went over to Fellerman's office and picked up the papers.

Q. I show you Defendant's Exhibit R in evidence and ask you whether you have ever seen those papers before? A. I have this one. Yes, I have seen these three. I have seen all of these papers.

Q. What are these papers comprising Defendant's Exhibit R?

The Court: Those are the confessions of judgment?

(608)

The Witness: Yes, sir, these are confessions of judgment and judgments.

Q. Your name appears as attorney on these confessions of judgment? A. Yes, sir.

Q. Did you place your name on these? A. No, sir.

Q. Did you prepare these papers? A. No, sir.

Q. Who prepared them? A. I believe Morris Switzer did.

Q. And who placed the name Benjamin H. Chasin, Attorney, on them? A. Morris Switzer did.

Q. You picked these papers up on a Friday? A. I believe it was, yes.

Q. What did you do thereafter in the matter? A. After I picked up the papers I completed it and had my secretary complete the order for that morning, entered the judgment in court, went over to the marshal.

Q. What court? A. Second District, Manhattan.

I then went over to the marshal, told him I (609) had an execution, wanted to know if he would go out to levy. He did.

We went to Berkeley Jewelers' place of business and went upstairs, we went in there and I told Mr. Faskow that this was a marshal with me. At that time I didn't know he was Mr. Faskow. I know now. I told the gentleman that I had seen there that we had a marshal levy to make.

He said, "Well, okay. Do what you want."

The marshal then went ahead. At that time I asked permission to call, and I called Mr. Fellerman's office and told him that he would have to have a custodian and that he should take care of that matter with the marshal, and then I left.

Q. Was there any time thereafter when you discussed this matter with Mr. Switzer? A. I believe that during the week that intervened between the levy and the sale I went up to Mr. Fellerman's office. Mr. Switzer was there, a Mr. Mintz was there and Fellerman.

I told them that I had made the levy; that the sale was scheduled for Saturday, and that he should be prepared

to protect his interest; that if he had to, to bid in order to get the value from his judgment. (610) And after that conversation I left.

Q. Did anyone else say anything besides your self at this conversation? A. Well, there was some other conversation.

> The Court: The question is, was there anybody else there?
>
> The Witness: Anybody else there. I mentioned those people that were there.

By Mr. Schwartz:

Q. Did any of these other people say anything? A. Well, I didn't give you a verbatim account. I don't quite remember. I know in essence that is what we discussed.

Q. Did there come a time when the sale was held? A. Yes, that following Saturday morning.

Q. What time of day was that, sir? A. Well, I got there early in the morning, about 9, and the sale was held about, I would say, between 9:30 and 10 o'clock that morning.

Q. Did you recognize anybody else there? A. Well, this Mr. Mintz was there, the marshal was, I was, and the gentleman that I spoke to when we made the levy, Mr. Faskow, Morris Switzer was there, (611) and as far as the others are concerned I didn't know anybody else.

Q. Now, was the sale held that morning? A. It was.

Q. Where were you during the time the sale was going on? A. Well, I stayed off in the corner. I was just there to see that I completed my job.

Q. How far were you from where the auctioneer was

conducting the bidding? A. Well, I would say that I was from where I am to where you are.

Q. Where was Mr. Switzer? A. Well, Mr. Switzer was wandering around. He was in various places.

Q. How many bids were made? A. Pardon me?

Q. How many bids were made? A. Well, as I recall it, they started to bid on lots, on separate items, but there was no bidders and then it was decided to have a bulk bid, and I believe there was just one bid made.

Q. Who made that bid? A. Mr. Mintz did.

(612)

Q. What happened after the bid was made? A. Well, there was some conversation as to the auctioneer wanted to know who the purchaser would be and I heard the name Shear mentioned.

Q. Who mentioned the name Schear? A. Mr. Switzer did.

Q. Did you thereafter get the proceeds of the sale? A. Thereafter the marshal sent me the proceeds. I deducted my fee and sent the check on to the client, yes.

Q. Your client was Mr. Fellerman? A. Yes, sir.

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(614) * * *

NAT GOODSIDE, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What do you do for a living? A. I am a licensed auctioneer in the City of New York.

Nat Goodside—for Government—Direct

Q. Please keep your voice up so that everybody can hear you.

Q. How long have you been an auctioneer, sir? A. About 25 years.

Q. Do you know a man named Morris Switzer? A. I do.

Q. Do you see Mr. Switzer anywhere in this courtroom? (615) A. I do.

Q. Will you point him out, sir? A. I believe he is the gentleman sitting at the counsel table.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer.

The Court: Yes.

By Mr. Schwartz:

Q. How long have you known Mr. Switzer? A. About 10 years.

Q. Do you know what Mr. Switzer does for a living? A. He is a lawyer.

Q. Now, are you associated with anyone in your business of an auctioneer? A. I am associated with Abraham Adisky, city marshal.

Q. Where is your office? A. We both have the same office at 285 Madison Street in New York.

Q. Prior to 1950 had you had business dealings with Morris H. Switzer? A. Through Marshal Adisky.

Q. What were those business dealings? A. From time to time we would have executions (616) or other court orders to attend to.

Q. Did you in January, 1950 meet a lawyer by the name of Benjamin H. Chasin? A. I did, sir.

Q. In what connection did you meet him? A. He brought several executions into Marshal Adisky's office.

Q. Do you know who referred him to Marshal Adisky? A. Mr. Switzer.

Q. Mr. Goodside, I show you Defendant's Exhibit R in evidence and I ask you if you have ever seen those before? A. Mr. Schwartz, do you mean the confessions or do you mean the executions?

Q. The executions. A. Yes, I did see them before.

Q. What are they, sir? A. They are executions on judgments.

Q. When did you see those before? A. When they were brought into the office.

Q. By whom? A. By Mr. Chasin.

Q. What did you do with these judgments when they were brought into your office? (617) A. The marshal and I and Mr. Chasin left for the defendant's place of business and we went there.

Q. By the "defendant," you mean the defendant on those executions? A. Yes, of course.

Q. Was that Albert Faskow or Berkeley Jewelers, Inc.? A. Berkeley Jewelers, that I remember, Inc.

Q. What did you do when you got to the premises of Berkeley Jewelers, Inc.? A. We met the gentleman in charge. We made a demand for the money. The money wasn't paid. The marshal made a levy and set it down for sale.

Q. Were arrangements made at that time for the posting of a custodian on the premises? A. Mr. Chasin said that he would attend to that.

Q. After you had posted this levy on the premises of Berkeley Jewelers, Inc., what, if anything did you do?

Nat Goodside—for Government—Direct

A. We then proceeded to post three notices of sale conspicuously.

Q. Where were these notices of sale posted? A. One notice was posted in the First District Municipal Court, in the lobby of the building at 8 (618) Reade Street.

Q. Where in the lobby of the building? A. There is a bulletin board on the wall as you come in.

Q. Where else? A. A second notice of sale was posted on the bulletin board to the rear of the ground floor of the Hall of Records building.

Q. Is that— A. That is the Hall of Records building right here on the corner.

Q. And is there a bulletin board there? A. Yes, there is.

Q. Where was the third posted? A. In the basement floor of the Supreme Court building. There is a bulletin board provided for that purpose.

Q. Was that the only notice that was posted of this sale? A. Three notices, Mr. Schwartz.

Q. These three notices. A. In addition to the one posted at the defendant's place of business.

Q. Was there any newspaper advertising? (619) A. No.

Q. Where in the defendant's place of business did you post it? A. The wall as you come in, left of the entrance door.

Q. Now when was the sale scheduled to take place? A. My recollection is it was January 20, 1950.

Q. Would that be January 28th? A. That's correct, Saturday morning.

Q. What time in the morning? A. Nine o'clock.

Q. Where was it to take place, sir? A. At the defendant's premises, 44 East 29th.

Q. Now, between the date of the levy and the date of the sale, did you receive a typewritten inventory of the merchandise on the premises? A. There was an inventory brought to the office, yes.

Mr. Schwartz: May I have that marked for identification, please?

(Marked Government's Exhibit 14 for identification.)

By Mr. Schwartz:

Q. I show you Government's Exhibit 14 for iden- (620) tification and ask you if that is the inventory you received during that week? A. Yes, sir.

Q. Do you know who brought it to your office? A. I don't know. I wasn't there when it was brought in. But I know it was in the office prior to the sale.

Q. Do you know who prepared it? A. No.

Mr. Schwartz: I offer it in evidence.

Mr. Stim: No objection.

(Government's Exhibit 14 for identification received in evidence.)

Mr. Schwartz: I would like to read some of the items on this inventory to you.

(Mr. Schwartz reads from Government's Exhibit 14 to the jury.)

Mr. Stim: I object to reading parts.

The Court: He can read what he wants and you can read what you want.

Mr. Stim: All right.

(Mr. Schwartz continues reading from Government's Exhibit 14 to the jury.)

Mr. Schwartz: May I show this to the jury, (621) your Honor.

The Court: Yes.

(Government's Exhibit 14 handed to jury.)

The Court: All right.

By Mr. Schwartz:

Q. Did the sale take place on January 28, 1950? A. It did, sir.

Q. On that date did you go there to conduct the sale? A. Yes, sir.

Q. Was anyone with you when you went? A. Marshal Adisky.

Q. Did you meet anyone there that you knew? A. Yes, sir.

Q. Whom did you meet? A. I met Mr. Chasin, Mr. Switzer, we met the man who we found there at the time who made the levy, and perhaps a dozen or more people who frequent city marshal execution sales.

Q. Would you describe the store as it was set up on the date of the sale? A. One flight up, turn to the left as you reach the top of the stairs and you walk into the store. The store or the loft is long; not too wide, long; it (622) runs perhaps the whole depth of the building, for all I know, and there were showcases, wall cases.

Q. Were those cases filled with merchandise? A. Yes, there was merchandise all over the place.

Q. Was there an office there? A. Yes, there were desks and a typewriter and things like that.

Q. Was there a safe? A. Yes, sir.

Q. Was it open or closed? A. Closed.

Q. Was it locked? A. Yes.

Q. Do you know what was in the safe? A. No, sir.

Q. Did anybody tell you what was in the safe? A. No, sir.

Q. Was there a stockroom? A. Not that I know of, sir.

Q. Was there an open door leading to a stockroom? A. Not that I know of, sir.

Q. Did you see any merchandise other than the merchandise in the showroom, the store? (623) A. I didn't, sir.

Q. Did you sell any merchandise other than what was in the showroom or the store? A. I didn't sir.

Q. Now did there come a time when you started to invite bids?

The Court: When you say what was in the store, you mean what was visual?

The Witness: That is right. Of course, there may have been goods on the shelves or under the counters?

The Court: You did not purport to sell anything that was in the safe?

The Witness: No, definitely not.

The Court: Did you purport to sell anything that might be in any storeroom?

The Witness: No, your Honor.

By Mr. Schwartz:

Q. Did there come a time when you started asking for bids? A. There came a time when something must start;

when I got up and made my announcement and made the materials of sale.

Q. What did you announce? (624) A. I announced "By virtue of several executions issued by the order of the Court"—and I read the title of the matter and the court—"by order of Marshal Adisky I will now proceed to sell the merchandise levied under these executions, and the defendant's right, title and interest in the fixtures, and the terms of sale were cash, and that all bids were subject to sales tax of the City of New York unless you were a dealer eligible to purchase property for resale."

Q. Now, having so announced the terms of sale, did you ask for bids? A. Yes. But then a lot of suggestions came a lot of talk came up by the buyers, the people who were there, the auction people. They asked if I would make the sale in separate lots. As an example, we take the contents of this showcase as one lot, take the contents of that wall case as one lot. And I told them that under execution sales we don't do those things, it is always sold in bulk.

Q. Then what happened? A. There was a lot of talk. They kept trying to convince me that I should do that and I could not do it. So we called a recess to quiet everybody down. So then everybody that was there, they got (625) into a huddle and there was a lot of talking, everybody but the marshal and myself, because we stood aside and minded our own business.

Q. Who was in this huddle? A. Practically everybody who was in the place.

Q. Who in particular do you remember being in this huddle? A. The attorney was there.

The Court: By "the attorney" you mean Mr. Chasin?

The Witness: Mr. Chasin.

A. (Continuing) The buyers were surely there. They were the ones who started this suggestion.

Q. These are the professionals who attend auction sales? A. Yes.

Q. And who else? A. Mr. Switzer was there. Everybody was there. There wasn't too much room to move around. There might have been 20 people there.

Q. What happened? A. Finally, as a result of all that conference or talk, Mr. Chasin said, "Okay, Nat, go right ahead and sell it the way you started, in bulk."

(626)

Q. Go ahead, sir. A. When I say in bulk I must impress upon you we put up two lots: one the goods and one the right, title and interest in the equipment which may have been mortgaged. For that reason we put up the right, title and interest.

Q. Were the same people there at that time that were there earlier? A. Some may have left in the interim or after, too.

Q. Do you know if anyone left? A. I think so.

Q. Who were the people who left? A. I couldn't tell you that. I don't remember them by name.

Q. Had you seen these people? A. In the auction business.

Q. They were the professionals in the auction business? A. Yes, a lot of them remained. Some of them went away. Perhaps they didn't want to bid on the thing in bulk. They would rather buy single lots.

Nat Goodside—for Government—Direct

Q. Did you thereafter resume the sale? A. I did, sir. (627)

Q. And did you ask for bids at that time? A. Yes, sir. The same materials of sale were announced and "how much am I bid?"

Q. This time you sold in bulk? A. Yes, the property in bulk first.

Q. Did you receive any bids? A. I got a bid of $1,200.

Q. That was to cover all of the property? A. Excepting the fixtures. Everything levied.

The Court: You told us you had two lots: one was all of the merchandise and the other lot was all of the fixtures.

Now, on the merchandise you got a bid of how much?

The Witness: $1,200.

By Mr. Schwartz:

Q. Were there any other bids? A. Higher than $1,200, you mean, Mr. Schwartz?

Q. Were there any other bids? A. No. $1,200, that was the highest bid.

Q. Were there any other bids? A. Somebody said $1,200 and that was the end. Nobody bid higher.

Q. Did you subsequently knock it down? (628) A. Sold for $1,200.

Q. Did you ask to be paid this money? A. We continued with the sale. We had the fixtures to sell. We sold the right, title and interest of the defendant Berkeley.

Inc. in and to all the equipment. That was sold for $100.

Q. How many bids did you get on the fixtures? A. One bid, $100.

Q. Did that complete the sale? A. That completed the sale.

Q. What did you do at that point? A. "What is your name, sir? Give me the money." And he gave us his name and he paid us the money.

Q. What name did he give you? A. Spear—can I look at the paper I have in my pocket, Mr. Schwartz? Irving Shear, S-h-e-a-r, 19 Harwood Street, Dorchester, Massachusetts.

Q. Did he pay the money? A. He paid us $1,326, which represented 2 per cent sales tax.

Q. What did you give him in return? A. I gave him bills of sale.

Mr. Schwartz: May I have these marked for identification.

(629)

(Marked Government's Exhibits 15 and 16 for identification.)

By Mr. Schwartz:

Q. I show you Government's Exhibits 15 and 16 for identification and ask you what they are? A. Bills of sale executed by me.

Q. Are they office copies? A. Yes, sir.

Q. In whose handwriting are they? A. Yes.

Q. Are they office records kept in the regular course of business? A. Yes.

Q. And are they true copies of the bills of sale that you gave to the purchaser? A. Except on the originals Marshal Adisky signed both of them. I have "AA" to show that he signed both of them.

Mr. Schwartz: I offer them in evidence. I do not offer the portion in ink reading "A. Adisky, 2 17 50," nor do I offer the designation on the upper right-hand corner indicating that they were exhibits at the prior proceeding.

Mr. Stim: No objection.

(630)

(Government's Exhibits 15 and 16 for identification received in evidence.)

By Mr. Schwartz:

Q. Mr. Goodside, I call your attention to the fact that Government's Exhibit 15 in evidence refers to a schedule and I ask you whether that schedule is not the schedule set forth in Government's Exhibit 14? A. We refer to the schedule that we had in our office in the bill of sale. Is that clear?

Q. Is that Government's Exhibit 14? A. That is it.

Q. And that is the schedule that you refer to? A. No question about that.

Mr. Schwartz: Ladies and gentlemen, Government's Exhibit 15 reads:

(Mr. Schwartz reads from Government's Exhibit 15 to the jury.)

Mr. Schwartz: And the schedule you have already seen.

Government's Exhibit 16 in evidence reads:

Nat Goodside—for Government—Direct

(Mr. Schwartz reads from Government's Exhibit 16 to the jury.)

Q. What, if anything, other than that did your (631) office do in connection with this transaction? A. Executions were satisfied on the face of the executions, they were filed in court "Satisfied" so that there would be a record of that.

Q. Were all of these executions returned satisfied? A. No, just one was wholly satisfied, one was partly satisfied and the other two were returned unsatisfied.

By the Court:

Q. In other words, what you mean by that is that you had four executions for $1,000? A. $1,029 each.

Q. But the total amount that you got was sufficient to discharge the full amount of one, and then the difference between whatever was left over from this was applied to the second? A. Correct.

Q. And the second was satisfied to that extent and unsatisfied as to the difference between that and the $1,000, and the others were returned unsatisfied.

By Mr. Schwartz:

Q. What happened? A. We turned the money over to the attorney for (632) the plaintiff. Of course, we deposited the proceeds over to the special marshal's account and then turned the money over to the attorney for the plaintiff.

Q. Less your fees? A. Less our fees of course.

Mr. Schwartz: That is all.

Nat Goodside—for Government—Cross

Cross examination by Mr. Stim:

Q. This is not the first auction of this type that you conducted during your career as an auctioneer? A. By no means. I conducted hundreds of them.

Q. These auctions are conducted as a result of executions filed in court? A. That's correct.

Q. Notices of the sale are posted in certain places that you indicated in the courtroom in various parts? A. That is correct.

Q. And professional buyers or these bargain buyers, they know where these notices are generally posted? A. No question about that. Of course they do.

By the Court:

Q. Maybe I can shorten this a bit. It is a (633) custom in this trade for people to go around and follow auctions of this kind? A. The same people have been following these auctions for 30 years, the same faces all the time.

Q. It is the custom for these people to go to the Municipal Court or the Hall of Records and check these bulletins from time to time where sales are announced. A. They check these things every day. And various other public houses.

Q. So that people who attend these auctions know the places where the notices are posted? A. Yes, sir.

Q. And they keep themselves informed in that way? A. Yes, that is correct.

Q. In addition to that in some cases notes are put in newspapers? A. Correct, sir. But at that time, under the Municipal Court Code, no newspaper advertising was required.

Nat Goodside—for Government—Cross

By Mr. Stim:

Q. When you announced the prospective bid, or, rather, sale of the merchandise in one lot, you announced right, interest and title to the fixtures, whatever it (634) may be. A. That is correct.

Q. And did you know at that time that there was a substantial chattel mortgage against these fixtures? A. I was told that the fixtures were mortgaged but I did not make a search for that purpose.

Q. In other words, the buyer just bought whatever he saw, the right, title and interest? A. He may be buying nothing if he buys right—title and interest.

Q. Do you know if these fixtures were never taken out or delivered? A. I wouldn't know.

Q. Now, Mr. Irving Shear, to whom you made out the bill of sale, he was there? A. Sure.

Q. And he gave you his right address, as far as you know, that he lived in Dorchester, Massachusetts? A. Yes, sir.

Q. And you received the money from him? A. Yes, sir.

Q. And these proceeds were deposited, you already testified, to the marshal's account? A. Yes, sir.

(635)

Q. And then after payment of taxes and fees, the balance was forwarded to the attorney for the plaintiff? A. That is correct, sir.

Q. And that is the same procedure which you followed in every auction pursuant to a levy on a judgment? A. That is correct.

Q. And when these buyers began the bid, as you said,

professional buyers, they wanted the bid separately on certain lots; is that so? A. That is what they tried to do: they tried to make me do.

Q. Are you permitted under the rules of the court to accept a bid separately on a lot or must they bid in bulk? A. I don't think there is any provision in the Municipal Court Code about that. We just sell in bulk. Marshals always sell in bulk, never in single lots.

Q. When the first bid was made for $1,200 and nobody else topped it, you sold it to that highest bidder? A. That is correct.

Q. And that is as the law requires you to do? (636) A. That is correct.

Q. Irrespective of the value? A. Yes.

Q. And if anybody would offer a higher bid? A. I would take his bid and continue from that point on.

Q. Your commissions are based on the price you sell it at? A. The more we sell it for, the more we make.

Mr. Stim: That is all.

Re-direct examination by Mr. Schwartz:

Q. You say you have been in the auction business for about 25 years? A. Yes, sir.

Q. And in the course of this auction business you have come to know many of the professionals who customarily bid at marshal's sales of this type? A. Mr. Schwartz, I know them all.

Q. And you have seen these people at many marshal's sales? A. Sometimes two and three times a day.

Q. Now, when these people attend sales of this sort, do they not come there to bid on merchandise? A. They come there to buy if they could.

Nat Goodside—for Government—Re-direct

(637)

Q. Isn't there a term in your business, a friendly execution? A. Yes.

Q. Would you tell the members of the jury what is meant by a friendly execution? A. It is where there is no conflict between the plaintiff and the defendant. Perhaps I don't use the right word, "conflict."

Q. Can you explain it more fully? A. Well, where the proceeding is a friendly one.

Q. Are there cases of friendly executions where professional bidders will attend the sale? A. Professional bidders attend every sale.

Q. In the course of your experience as an auctioneer, have instances come to your attention where professional bidders were paid money not to bid? A. Will you repeat that, please, Mr. Schwartz.

The Court: In your experience, have you ever learned of situations where professional bidders who might ordinarily be expected to come to a sale were paid money in order to remain away or, if they came, to refrain from putting in a bid?

The Witness: Yes, I have known of such.

(638)

By Mr. Schwartz:

Q. Now, as a person engaged in the auction business for 25 years, have you acquired some familiarity with values in the jewelry and appliance business? A. Jewelry and appliances?

Mr. Stim: I object to that. It is improper redirect.

The Court: I will allow it.

Have you come to have a knowledge of values of the kind of merchandise that was put up for sale in this Berkeley Jewelers?

The Witness: Yes, I do.

The Court: Very well.

By Mr. Schwartz:

Q. And would you know——

The Court: On the basis of that experience and having looked at the merchandise which you sold that day, are you able to, with any reasonable degree of certainty, to give us an opinion as to what that merchandise was worth that you sold that day?

The Witness: I think $1,200 was a fair and reasonable bid for the property mentioned in the schedule.

Q. For 280 watches, 21 candlesticks and candlebra, (639) 271 clocks, 8 cameras, the crosses, compacts, chains, carpet sweepers, cookers, chests, dishwashers, miscellaneous, dishes and sets, egg cookers, and sets, fans, fraternal pins, food choppers, glass sets, hair dryers, hostess sets, 75 irons, a lot of key chains, 60 lighters, 15 music grinders, platters, pen and pencil sets, silverware, sugar and creamers, victrolas, vacuum cleaners, water coolers, waffle iron, was that new merchandise?

Mr. Stim: I object to that question.

The Court: I will allow him to answer whether it was new merchandise.

A. Yes, it was. Perhaps, Mr. Schwartz, you didn't understand my answer.

Q. Perhaps you would like to explain your answer. A. When a man goes to an auction sale he goes for the purpose of buying as cheap as he can because he has got to ultimately resell it.

The Court: Let's see if I can shorten it.

By the Court:

Q. I asked you if you were able to give us an estimate of value and your answer was that you thought this was a reasonable bid. A. A bid, yes.

Q. Now, the point is, what counsel was asking (640) you was what the value was. A. In dollars and cents? I couldn't tell you that.

Q. But as a bid under the circumstances of this kind of a sale, you say that is what this would have brought in any sale? A. If the sheriff sold it or a constable sold it. It may be worth a whole lot more.

Q. Your experience would indicate that, in most of these sales, the amount that they bring at the sale is far below the actual value? A. No question about that.

By Mr. Schwartz:

Q. Now, Mr. Goodside, were you interviewed by me at my office yesterday evening? A. I was, sir.

Q. Were you further interviewed by me at my office?

Mr. Stim: I object to that.

The Court: Wait a minute. He said he was interviewed yesterday and once before. Now let us see——

Mr. Stim: I don't think that is proper.

The Court: Maybe you know where he is head-
(641) ing, Mr. Stim. I don't. The only way I can find out is if I hear what he has.

By Mr. Schwartz:

Q. Were you examined by me this morning? A. Yes.

Q. At that time did I ask you certain questions about this particular marshal's sale? A. You did, sir.

Q. And did I ask you at that time whether in your opinion this was a bona fide sale? A. You asked me that.

Q. And did you not tell me that this was a friendly sale?

Mr. Stim: Your Honor, there is nothing inconsistent with his testimony here on that.

The Court: Did you say in your opinion this was a friendly sale when you were talking to Mr. Schwartz?

The Witness: If Mr. Schwartz says I said that I go along with him.

The Court: The question is did you say it? What do you say you said? He said you said it. We want to know whether you said it.

The Witness: I said it.

(642)

By Mr. Schwartz:

Q. Did you not further tell me that the merchandise that was sold was worth a lot more than the $1,200? A. I

repeat that now. I said that a moment ago, that the property was worth far more.

By the Court:

Q. In your experience, which includes some of what you call friendly sales, is it a fact that in a friendly sale situation the amount of the sale is likely to be less than if it were not a friendly sale? A. The amount of the bids is dependent on who attends the sale.

Q. In a friendly situation? A. The friendly relationship is solely between the plaintiff and the defendant and not the respective bidders.

Q. You made that clear. What I want to know is, is it your experience that in the case of friendly sales the bids are lower than in sales which are not known as friendly sales? A. Your Honor, the man who attends the auction sale, the strange people, they don't know, they have no idea as to the condition of the situation.

Q. That is so. But, you see, you are not answer- (643) ing the question. My question is, what has been your experience? Has it been your experience that, where friendly sales are being held, the amount of the bids, by whomever made, were lower than the bids customarily made at sales which are not known as friendly sales. A. I will answer it this way:——

Q. Answer it truthfully. A. I always tell the truth. On friendly matters, where we feel it is a friendly matter, there is a distinct—it is a paradox where a strange man is buying it: he will pay the limit. We will chase him up as high as we possibly can for the purpose of bringing the plaintiff as much money as we can. On the other hand, if

the plaintiff is going to buy it in a friendly manner, he gets it as cheap as he can. Is that clear, your Honor?

Q. Well, it comes to this, then: that where one of the buyers is the plaintiff, where he buys he gets it at a low price? A. Correct, sir.

By Mr. Schwartz:

Q. Did you not further tell me that, on the basis of your experience, it was your firm opinion that somebody took money out at that sale but you did (644) not know who it was? A. I said in my opinion I thought that the people, the auctioneers or buyers who were there, were well taken care of not to bid.

Mr. Schwartz: No further questions.

The Court: Do you mind if I ask a question, M Stim?

By the Court:

Q. Has it been your experience in certain types of friendly sales that the so-called professional buyers are bought off? A. No question about it.

Q. And you observed— A. In this instance I did not see anything.

Q. You did not see any money paid? A. Not a nickel.

Q. The general circumstances, you say, led you to believe that this buying off of professionals had occurred in this case? A. That is correct.

The Court: Very well.

Re-cross examination by Mr. Stim:

Q. When Mr. Schwartz or his associates talked to you this morning or yesterday, were you told about (645) friendly sales and the customs of friendly sales? A. Was I told by whom?

Q. By Mr. Schwartz. A. No.

Q. But can you say that you had any observation in that sale that somebody either was bought off or was paid off? A. I told Mr. Schwartz yesterday that, after this huddle, this talk by all the people that were there, some of them went home, others remained and kept their mouths shut. I said that somebody grabbed a bundle to keep quiet.

Q. That was your opinion? A. That was my opinion.

Q. You did not see it? A. I wish I got a piece of it but I didn't.

Q. Did you later on find out that this merchandise was returned? A. I found out later that it was returned to the trustee in bankruptcy.

Q. In other words, it was put in warehouses and kept until— A. I don't know what happened, but I do know that the trustee in bankruptcy ultimately got posses- (646) sion of the property. I know that.

Q. And the plaintiff delivered that merchandise pursuant to a stipulation? A. That is right.

The Court: Did you know that it was ultimately sold for $10,000?

The Witness: No, I did not, sir.

The Court: Any further questions?

Re-direct examination by Mr. Schwartz:

Q. Did you know that all the merchandise that was sold was returned to the trustee? A. I will tell you what happened about that——

The Court: Did you hear it from somebody?
The Witness: I heard that from Marshal Adisky.
Mr. Schwartz: No further questions.

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(647)

Bernard Kwartin, called as a witness by the Government, being first duly sworn, testified as follows.

Direct examination by Mr. Schwartz:

Q. Mr. Kwartin, what do you do for a living? A. I am a singing teacher.

Q. Would you please keep your voice up so that the last juror in the box can hear you speak. A. I am teaching singing.

Q. Are you related to a man named Jack Shulman? A. Yes, he is my nephew.

Q. Do you know what Mr. Shulman's business was in the years 1949 and 1950? A. Financing business. You have to excuse me. I am hoarse. I have a cold. I cannot speak.

Q. Was the name of his financing business the Bucknell Trading Company? A. Yes.

Q. Do you know a man named Morris Switzer? A. Yes, sir.

Q. Do you see Mr. Switzer in this courtroom? A. I will have to have my glasses. I don't know. I don't see him.

The Court: Do you want to step down, look (648) around and look closer.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer.

By Mr. Schwartz:

Q. Do you know what Mr. Switzer's business was in the years 1949 and 1950? A. Well, he was in the same office as my nephew.

Q. Was he a lawyer? A. Yes.

Q. Did he have any other business? A. I don't know.

Q. Was he associated with your nephew in the Bucknell Trading Company? A. Yes, I think so. Yes.

Q. Did there come a time when you met a man named Albert Faskow? A. Yes.

Q. Do you remember what Mr. Faskow's business was in the summer of 1949? A. It was the Berkeley Jewelry Company.

Q. And was Mr. Faskow the president of that corporation? A. Yes.

Q. Did there come a time when you loaned some (649) money to the Berkeley Jewelers, Inc.? A. Yes.

Q. Was that during the summer of 1949? A. Yes.

Q. Now who introduced you to Mr. Faskow? A. Mr. Switzer.

Q. Did you have a conversation with him and Mr. Faskow at that time? A. Yes, when I was there in his office.

Q. Was anybody else there when you had the conversation? A. I don't remember. I don't think so.

Q. Was your nephew Jack there? A. No, I don't think he was there.

Q. Will you tell us what the conversation was that took place between you and Mr. Switzer and Mr. Faskow at that time? A. Well, I lent him $3,000 and he gave me some collateral.

Q. You lent who $3,000? A. Pardon?

Q. Whom did you lend $3,000? A. To Mr. Faskow.

Q. And did you speak with Mr. Switzer? (650) A. Yes, sir; it was on his recommendation.

Q. What did Mr. Switzer say? A. He recommended it.

Q. Now, there was interest on that loan? A. Yes.

Q. Was that loan paid? The loan to Berkeley Jewelers, Inc., was that paid by Berkeley Jewelers, Inc.? A. No. It was about in the winter, a few months later, so he was supposed to give me a check for some $180 and he never did. So I called up my nephew and I told him. He asked me to come over and he told me he is going to make some arrangements I should get my money back.

Q. Did you get any part of your money back? A. I got a number of notes. I think it was $50 each.

Q. Whose notes were they? A. It was Berkeley—it wasn't Jewelry any more, it was Berkeley——

The Court: Was it Berkeley Pennsylvania?

The Witness: Yes, Berkeley Pennsylvania Company.

Q. Had you loaned any money to Berkeley Pennsyl-
(651) vania, Inc.? A. No.

Q. When you received these notes what did you do with them? A. I deposited them in my bank and they used to get each week there, it was, and then it stopped.

Bernard Kwartin—for Government—Direct

Q. How long were they paid? A. I don't remember. I would say perhaps eight or ten or so. I don't remember.

Q. There came a time when they stopped being paid? A. Yes.

Q. Then what did you do? A. I again called up my nephew and I told him. So he told me I should give him the notes and I should deposit the collateral. So I did in a warehouse somewhere in the city—I don't know where it was—and he took over the notes and he paid me out whatever it was the rest.

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(653) • • •

HERMAN LIPSON, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. Mr. Lipson, what do you do for a living? A. Furniture and manufacturing.

Q. What is the name of your business? A. Bucknell Chrome Furniture.

Q Are you the president of that corporation? A. I am the owner, yes.

Q. Were you in that business also in the month of January, 1950? A. Yes, sir.

(654)

Q. Do you know a man named Morris H. Switzer? A. Yes, sir.

Q. Do you see Mr. Switzer anywhere in this courtroom? A. Yes, sir.

Q. Kindly point him out. A. The gentleman in the middle.

Mr. Schwartz: May the record indicate it.

By Mr. Schwartz:

Q. What was Mr. Switzer's business during 1950? A. Well, he was my attorney and he was also interested in a factoring business.

Q. Was that the Bucknell Trading Corporation? A. Yes, sir.

Q. Did your corporation ever borrow money from the Bucknell Trading Corporation? A. Yes, sir.

Q. Do you know a man named Jack Shulman? A. Yes, sir.

Q. Who was Jack Shulman? A. Mr. Switzer's associate.

Q. In the Bucknell Trading Corporation? A. That is right.

Q. Where did you live in January, 1950? (655) A. At 715 Harrow Street, Forest Hills.

Q. Now, during the month of January, 1950, did you have any conversations with Mr. Switzer or Mr. Shulman? A. Well, I had various conversations. In reference to what?

Q. Did you have any conversations with respect to the merchandise, with respect to the jewelry and appliances?

Mr. Stim: May we have the name? He said, "I had various conversations," without giving the name of the party with whom he had them.

Herman Lipson—for Government—By the Court

By the Court:

Q. Some time in the early part of 1950 did you have a conversation with anybody about merchandise consisting of watches, jewelry, television sets, electrical appliances, in a store on 23rd Street, or 29th Street, rather? A. No, not in reference to any store. The only conversation I did have was——

Q. First of all, did you have it with respect to that kind of merchandise? A. No detailed items were mentioned.

Q. With whom did you have the conversation? (656) A. Well, it was either Mr. Switzer or Mr. Shulman or both.

The Court: All right.

By Mr. Schwartz:

Q. Where did this conversation take place? A. It might have been on the phone.

By the Court:

Q. Well, it might have been anywhere. Tell us where. A. I couldn't say where because I did have phone conversations two or three times a week.

Q. Did you have some personal face-to-face conversations? A. At various times, yes.

Q. You are not clear now? A. That's right.

Q. It might have been either a personal conversation or a phone conversation? A. That's right.

Q. Did you know both of them so as to know their voices when you heard them on the telephone? A. Yes, definitely.

Herman Lipson—for Government—By the Court

Q. State what the conver ation was. A. The conversation was if I would let them use (657) my basement to put some merchandise away on a loan of theirs that went bad and they were retrieving some collateral.

By Mr. Schwartz:

Q. Did they say a loan of theirs went bad? A. Well, it was collateral on a loan.

Q. How did they propose to get this merchandise to your home? A. Well, I loaned them a station wagon.

Q. To whom did you loan the station wagon? A. Well, either Mr. Shulman or Mr. Switzer.

Q. Do you remember which one of those two gentlemen you loaned the station wagon to? A. Well, they both took it at various times.

Q. Did there come a time when merchandise was brought to your home? A. Yes.

Q Was that during the month of January, 1950? A. Well, I don't know what month it was. I do know merchandise was brought there.

Q. Who brought it to your home? A. Well, Mr. Shulman and Mr. Switzer.

Q. Were they both present when this merchandise was brought to your home? (658) A. As near as I can recall, yes, at least on one occasions.

Q. How was the merchandise brought to your home? A. Well, it was packed in cartons.

Q. How was it transported to your home? A. By station wagon.

Q. Was that your station wagon, sir? A. Yes, sir.

Q. On how many occasions during 1950 was merchandise brought to your home by station wagon? A. Well, there

were two that I am positive of. It might have been more. I might not have been home. They had been coming and going at various times.

Q. What was done with this merchandise when it was brought to your home? A. It was brought down to my basement.

Q. What sort of merchandise was it that was brought down to your basement? A. Electrical appliances, some loose silverware, flatware such as knives and forks, a few watches, cheap watches, some rings.

Q. What kind of rings? A. They were more or less trinkets. There was (659) nothing. They were rings.

Q. Were they gold rings. A. I assume they were gold rings.

Q. Were there gold watches? A. Well, I don't know if they were gold watches. There were some Bulova watches, if you want me to be specific and a couple of various brands. I don't know if they were gold or not.

Q. Were there heavy Masonic rings? A. Yes, there were Masonic rings, yes.

Q. Did you have a conversation with anyone at the time this merchandise was brought to your home? A. Well, when it was brought the first time I showed them the way down to the basement.

Q. You showed who? A. Mr. Shulman and Mr. Switzer.

Q. Was that the only conversation you had? A. Well, I was curious to know what was in it and they told me miscellaneous appliances and what I just stated.

The Court: Did you take a look yourself?

The Witness: Well, most of the cartons were sealed. There were a few cartons that were opened. I looked at the opened cartons.

(660)

By Mr. Schwartz:

Q. Did there come a time when any of this merchandise was sold, to your knowledge? A. At various times.

Q. Explain how that came about? A. Well, a number of times some people were brought in to look at it and——

Q. Were brought in to look at it by whom? A. Mr. Shulman and Mr. Switzer.

Q. And on those occasions what happened? A. Well, they walked down to the basement and when they came up they carried various items with them.

Q. Did you ever have any conversations with Mr. Switzer about this? A. Yes.

Q. What did he say to you and what did you say to him? A. Well, I was interested in having the merchandise taken out after a while because it littered up the whole place, and——

Q. Did you ever have any conversation with Mr. Switzer about these sales of merchandise? A. In reference to what?

(661)

By the Court:

Q. You just told us from time to time Shulman and Switzer brought people in and took them down to the basement, and when the people were leaving they were carrying packages of merchandise. Did you ever have a talk with either Shulman or Switzer about these instances? A. Well, I had a talk.

Q. Did you— A. I always spoke to them.

Herman Lipson—for Government—By the Court

Q. Did you ever say to them, for instance, "What are these people coming in and what are they carrying out"? A. No.

Q. Did you ever ask them if they were selling it? A. Yes, I did ask them if the merchandise was being sold and they said they are disposing of it as best they can and it is a question of time and it will be cleaned out.

By Mr. Schwartz:

Q. Did there come a time when this merchandise was cleaned out from your home? A. Yes.

(662)

Q. When was that? A. I would say three months from the original time it was put in.

Q. Do you know a man named Irving Shear? A. Yes, sir.

Q. Was he ever at your house during the period when the merchandise was there? A. Yes.

Q. Did you ever receive any payment for the use of your home for this merchandise? A. No, sir.

Q. Did you ever receive any presents from anybody for doing that? A. I might have got a trinket or something.

Q. By a trinket, do you mean a pen and pencil set? A. I don't remember but now that you bring it up, it may have happened.

. . . .

(664)

IRVING SHEAR, called as a witness by the Government, being first duly sworn, testified as follows: . .

Direct examination by Mr. Schwartz:

Q. What do you do for a living? A. I work for the Post Office as a regular clerk in Boston.

Q. Is that Boston, Massachusetts? A. Yes, sir.

The Court: Mr. Shear, will you please keep your voice up. Probably you don't talk loud but it is necessary for everybody in the jury box and for counsel at the second table to hear you. Speak out as loud as you can.

Q. How long have you been working for the Post Office? A. Since 1947.

Q. Do you know a man named Morris H. Switzer? A. Yes, sir.

Q. Do you see Morris H. Switzer anywhere in the courtroom? A. Yes, sir.

Q. Will you point him out, please.

The Court: The witness identifies the de- (665) fendant.

Q. Are you related to Mr. Switzer? A. Mr. Switzer is my wife's brother-in-law.

Q. Were you quite friendly with him during the years 1949 and 1950? A. Yes, sir.

Q. Now, during the month of January, 1950, did there come a time when you received a telephone call from Mr. Switzer? A. Yes, sir.

Q. Did you then have a conversation with him? A. Yes, sir.

Q. Would you please keep your voice up, sir. A. Yes, sir.

Q. What did Mr. Switzer say to you and what did you say to Mr. Switzer on that occasion? A. Mr. Switzer said that he had an opportunity for me in New York whereby he thought that I could better myself; that a firm by the name of Berkeley Jewelers had gone into bankruptcy and that they were going to form a new corporation, and Mr. Switzer said that the new corporation was the one they wanted to set me up as the president and give me an opportunity to learn the business.

(656)

Q. Now at that time what was Mr. Switzer's profession? A. He was a lawyer.

Q. Did he have any other business? A. Yes, he was also in the factoring business.

Q. Did he tell you he was interested in this Berkeley Jewelers, Inc.? A. Well, I understood it——

Mr. Stim: I object, your Honor.

The Court: Try to tell us as nearly as you can what Mr. Switzer told you.

A. Well, he told me that the factoring business had bought the stock of the Berkeley Jewelers and that was the stock that was going to be used in the new corporation, to get it established.

Q. What else did he say to you during the course of that conversation, if anything? A. That is all I recall right now.

Q. Did he ask you whether you would come to New York? A. Yes, he asked me if I would come to New York, and I said that I would; that I wanted to give it a try to see if I could better my position, because at that particular time I was not a regular employee at (667) the Post Office, I was only a temporary employee.

Q. Did there come a time when you came down to New York? A. Yes.

Q. When was that? A. Well, I believe that Mr. Switzer called me on a Saturday, and the following day he came down and took myself and my family to New York.

Q. Do you recall the specific date that it was that you came down to New York? A. I think it was the end of January, the 28th or 29th.

Q. And you say Mr. Switzer took you and your family down to New York? A. Yes, sir.

Q. Was that by automobile, sir? A. Yes, sir.

Q. Where did you stay in New York? A. I stayed at my mother-in-law's house.

Q. Do you know where Mr. Switzer lived at that time? A. Mr. Switzer lived in the same apartment house. That was in Brooklyn.

Q. Did there come a time when you went down to (668) the store of Berkeley Jewelers, Inc.? A. Yes, sir.

Q. When was that, sir? A. That was the following day, on a Monday.

Q. Would that be January 30, 1950? A. Yes, sir.

Q. Was anyone with you when you went down there? A. Yes. Mr. Switzer was with me.

Q. Did you have a conversation with Mr. Switzer at that time? A. Well, Mr. Switzer brought me over to the Berkeley Jewelers and he introduced me to Al Adler.

who was working there at the time, and he told me to help Mr. Adler to get the things packed; that they were going to be moved to another location.

Q. Was that the full conversation? A. Yes, sir.

Q. Did you have any conversation with Mr. Switzer about the marshal's sale? A. Yes. He told me that the merchandise there at Berkeley Jewelers had been bought at a marshal's sale and had been bought under my name.

Q. Did he tell you who put up the money to buy this merchandise under your name? (669) A. I understood it was put up by the factoring business.

Q. Now did you help Mr. Adler to pack the merchandise at the store on that day? A. Yes, sir.

Q. How long did you continue to do that, sir? A. I would say about two hours.

Q. And then what happened? A. Then Mr. Switzer came up and told me that he was going to take me over to a store on Broadway which he had made arrangements for the new corporation.

Q. Was that the Berkeley Pennsylvania Corporation? A. Yes, sir.

Q. Did you have a conversation with Mr. Switzer at that time? A. Well, he told me that they were going as soon as the merchandise was packed; that the Berkeley Jewelers—that it was going to be taken over by truck to the new location. And at that time I also signed the lease for the new location of the Berkeley Pennsylvania Corporation.

Q. Did you have a conversation with Mr. Switzer about what the business of the Berkeley Pennsylvania (670) Corporation was to be? A. Yes.

Q. What did he tell you about that? A. Well, it was a sort of a lay-away plan business operated mostly in Penn-

sylvania, and that there were two salesmen on the road, and there were also one or two collectors; that the new corporation was going to take over the accounts of the Berkeley Jewelers and keep it going as a running business.

Q. Now, who was the president of the Berkeley Pennsylvania Corporation? A. I was, sir.

Q. Who were the stockholders of the Berkeley Pennsylvania Corporation? A. Well, I had no investment in it whatsoever.

Q. Who did own that business? A. Well, as I say, Mr. Switzer told me it had been bought by the factoring business.

Q. Were you ever promised an interest in the Berkeley Pennsylvania Corporation? A. Well, I was told originally the idea was I was to go out and try it to see whether or not I liked the business and that, if I did and if things turned out all right, then I would have an interest in (671) it.

Q. Who told you that, sir? A. Mr. Switzer.

Q. Did you thereafter start doing business under the name of Berkeley Pennsylvania Corporation? A. Yes, sir.

Q. Who was associated with you in that business? A. Well, there was Mr. Adler, who was just a worker there, and there was Mr. Faskow and his daughter Renee Faskow.

Q. What kind of work did Mr. Faskow do for the Berkeley Pennsylvania Corporation? A. Well, Mr. Faskow was running the business.

Q. What kind of work did you do for the Berkeley Pennsylvania Corporation? A. Well, not very much. I more or less took care of the office, answered a few phone calls and in the event there was anything to go out to buy

or any watches to take down to be repaired, why, I took care of it.

Q. Did you sign checks? A. Yes, sir.

Q. Did you sign any other papers? A. Yes, sir, I signed the lease and also signed (672) some notes payable at the rate of $50 per week.

Q. Did you ever hear the name Bernard Kwartin before? A. Yes, sir.

Q. Who was Bernard Kwartin? A. He was the man the notes were made up to.

Q. Had he ever loaned any money to Berkeley Pennsylvania Corporation? A. No, sir.

Q. What did Renee Faskow do in this business? A. She took care of the books.

Q. Who ran the business when Mr. Faskow wasn't there? A. Well, it was Renee Faskow and myself.

Q. What did Al Adler have to do? A. Well, he took care of the stock.

Q. Did Mr. Albert Faskow draw any money from the corporation? A. Yes, sir.

Q. How much did he draw? A. I would say $100 per week.

Q. Did you draw any money from the corporation? A. Yes, sir. $75 per week.

(673) tion? A. Yes, sir. About $35 or $40 a week.

A. Yes, sir. About $35 or $40 per week.

Q. Did Renee Faskow draw any money from the corporation? A. No, sir.

Q. Well, what hours did Renee Faskow work? A. Well, I wouldn't remember offhand. I would say approximately 9 to 5, 10 to 5.

Q. A full day? A. Most of the time.

Q. During all the time that you were there? A. Yes, sir.

Q. And she drew nothing? A. Yes, sir.

Q. How long did you stay in New York as the president of the Berkeley Pennsylvania Corporation? A. I would say about six or seven weeks.

Q. Did you see Mr. Switzer during that period? A. Yes, I saw him every day.

Q. Did you have any conversations with him about the business? A. Yes.

Q. What were those conversations generally? A. Well, actually, as far as the technical end (674) of the business, I say Mr. Faskow was the one who took care of that.

> The Court: You mean going out and selling and getting these accounts and so on? Is that what you mean by the technical end?
>
> The Witness: That is what Mr. Faskow took care of. Mr. Switzer most of the time was speaking about sort of trying to give me a general business education.

By Mr. Schwartz:

Q. Now, was Mr. Switzer the attorney for the new corporation? A. Yes, sir.

Q. Was he paid any fees as attorney for the new corporation? A. I think in only one instance he was paid a fee.

Q. Do you know a man named Jack Shulman? A. Yes, sir.

Q. Who was Jack Shulman? A. He was in partners with Mr. Switzer in the factors business.

Q. Did he ever come to the Berkeley Pennsylvania Corporation? (675) A. Yes, sir.

Q. Did you speak with him on those occasions? A. Very, very rarely. I had very little to say to him.

Mr. Schwartz: Your Honor, it is 12 noon. Do you wish to suspend at this time?

The Court: Yes.

2:30, ladies and gentlemen.

(Whereupon, a recess was taken until 2:30 p.m.)

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(676)

AFTERNOON SESSION

IRVING SHEAR, resumed.

Mr. Stim: Your Honor, may the district attorney and I approach the bench?

The Court: Yes.

(Discussion at the bench off the record.)

Direct examination continued by Mr. Schwartz:

Q. Now you testified this morning that merchandise from Berkeley Jewlers, Inc. was brought over to Berkeley Pennsylvania, Inc. Was that merchandise actually used in the business of the new corporation? A. It was brought over but nothing was ever sold from the merchandise that was brought over.

Q. Did you maintain a sample line in the office of Berkeley Pennsylvania? A. Yes, sir.

Q. Now I believe you testified that at the time you

nrst spoke to Mr. Switzer at the office of Berkeley Jewelers, Inc. there was some discussion as to the merchandise that was to be used by the new corporation; is that so, sir? Yes, sir.

Q. What was the discussion at the time you (677) originally spoke to Mr. Switzer? A. Well, originally, when I spoke to him, the merchandise from Berkeley Jewelers was to be brought over to the Berkeley Pennsylvania and was to be used as the merchandise for the new corporation.

Q. Did there come a time when that plan was changed? A. Yes, sir.

Q. Did you speak to anybody about that? A. Well, Mr. Switzer told me that something had come up and that none of the merchandise was to be sold.

Q. What was the new corporation going to use for merchandise? A. In that case he said any orders that we had to fill, that I would have to go out and buy new merchandise to fill the orders.

Q. Do you know what happened to the merchandise from Berkeley Jewelers, Inc.? A. Well, part of it stayed in the store on Broadway and part of it was in a store on Pitkin Avenue in Brooklyn.

Q. Do you know of any other location where that merchandise was? (678) A. No, sir.

Q. Did you, during the time that you were president of the Berkeley Pennsylvania Corporation, ever have occasion to buy merchandise for that corporation? A. Yes, sir.

Q. Did that corporation continue to operate a business in the rural areas of Pennsylvania? A. Yes, sir.

Q. Did you know a man named Herman Lipson? A. Yes, I do.

Q. Did you meet Mr. Lipson during the period of time

that you were president of the Berkeley Pennsylvania Corporation? A. Yes, I did.

Q. How did that come about, sir? A. Well, Mr. Switzer told me that he had some other merchandise that he had purchased and that he wanted to sell it at a private sale at Mr. Lipson's house, and would I go down and help him arrange the merchandise in Mr. Lipson's cellar, which I did.

Q. Did he tell you where this merchandise came from? A. No. He just said that it was other merchandise that he had bought.

(679)

Q. Did he say that it wasn't merchandise of Berkeley Jewelers, Inc.?

Mr. Stim: I object to that, your Honor.

The Court: I will sustain the objection. Did he tell——

By Mr. Schwartz:

Q. What did he tell you—that it was some merchandise that he bought? A. No, sir.

The Court: Did he tell you where he bought it?

The Witness: No, sir.

The Court: He just said he had merchandise available?

The Witness: Yes, sir.

Q. Did you subsequently go to the home of Herman Lipson? A. Yes.

Q. What did you do when you got there? A. There

was a lot of merchandise around and I took it out of the boxes and spread it around in the cellar on tables.

Q. Was anyone there when you were doing that? A. Yes, sir.

(680)

Q. Who was there? A. There was Mr. Switzer and Mr. Shulman and Mr. Lipson.

Q. What, if anything, happened after the merchandise was set up in the manner that you have described? A. I beg your pardon?

Q. What happened after you set up the merchandise? A. I was there, I would say, for a couple of hours, and then I left and went home.

Q. Did anything happen before you went home? A. Well, there were a few people that came in that were looking around.

Q. Looking around at what? A. At the merchandise that was on display.

Q. Do you know if any of this merchandise was sold? A. Yes, sir.

Q. Do you reall any particular items that were sold? A. Well, when I was there I never actually saw anything that was sold but I did hear afterwards that some of it had been sold.

Q. Any particular items of merchandise?

Mr. Stim: I move to strike out that he (681) heard afterwards the merchandise was sold.

The Court: Who told you?

The Witness: Mr. Switzer told me.

Mr. Stim: I withdraw the objection.

By Mr. Schwartz:

Q. Any particular items that you heard were sold were by Mr. Switzer? A. The only thing that I heard was an expensive watch that had been worth a couple of hundreds had been sold.

Q. Did there come a time when you left the employ or you left your association with the Berkeley Pennsylvania Corporation? A. Yes, sir.

Q. When was that, sir? A. Well, that was, I would say, about six or seven weeks after I had been there I had received a letter from the Post Office that I was eligible for a regular appointment in the Post Office and, weighing one against the other, I thought I certainly would be much better off as a postal employee and I told Mr. Switzer at that time that the appointment had come up and I thought it was definitely the best thing for myself and my family and that I was going to back to Boston.

(682)

Q. What did Mr. Switzer say about that? A. Well, he said the decision was up to me; that he would have to get someone to replace me.

Q. Now, at the time you left were you still the president of the Berkeley Pennsylvania Corporation? A. Yes, sir.

Q. Were you the only party who could sign checks? A. Yes, sir.

Q. Do you know if that corporation continued in existence after you left? A. I don't know how long they left. I spoke to Mr. Switzer about that and he said that he would take care of whatever legal proceedings were necessary to take me off as president of the corporation.

Q. Was anything said about writing of checks for the

new corporation when you were gone? A. Well, he asked me if I would sign some checks so that they could continue to operate the business until they were able to make other arrangements.

Q. Did you do that? A. Yes, sir.

Q. Did you sign those checks in blank? A. Yes, sir.

(683)

Q. Did there come a time when you were contacted by agents of the FBI? A. Yes, sir.

Q. When was that, sir? A. Well, I don't recall offhand. I would say probably three or four months after I got back to Boston.

The Court: Was that still in the year 1950?
The Witness: I think it was, sir.

By Mr. Schwartz:

Q. Did you speak to anybody about that? A. Yes, sir.

Q. To whom did you speak? A. Mr. Switzer.

Q. You had a conversation with him? A. Yes, sir.

Q. What did you say to him and what did he say to you? A. Well, I told him that someone had been there from the Federal Bureau of Investigation, and he said that the best thing to do was not to make any statement; that he would be my lawyer and that he would represent me.

(684)

Q. Did there come a time when you were subpoenaed to appear as a witness before the grand jury? A. Yes, sir.

Q. Do you recall when that was? A. Well, I don't recall the date, no, sir.

Q. Did you speak to anyone about your appearance before the grand jury? A. Yes, I spoke to Mr. Switzer about it.

Q. Tell us what you said to Mr. Switzer and what he said to you. A. Well, he told me, when we came up before the grand jury, that one thing I should not say anything as far as Mr. Faskow was concerned, as far as his participation in the Berkeley Pennsylvania, and he also said not to say anything as far as the sale of the goods that Mr. Lipson was concerned with because, he told me at that time, that had been the property of Berkeley Jewelers.

Q. Was that the first time you found that out? A. Yes, sir.

Q. Did you subsequently go into the grand jury and testify? A. Yes, sir.

Q. Was your testimony true or false? (685) A. It was false, sir.

Q. Were you subsequently indicted by that grand jury? A. Yes, sir.

Q. Were you represented by an attorney thereafter? A. Yes, sir.

Q. Who was your attorney? A. Mr. Switzer.

Q. How long did he continue to be your attorney? A. Up until about two months ago.

Q. During that time did you have any conversations with Mr. Switzer? A. Yes, sir.

Q. On how many occasions? A. Well, I saw Mr. Switzer quite often. The family was still friendly.

Mr. Stim: I can't hear him.

A. I said I saw him on quite a few occasions.

Q. Will you tell us what you said to him on those occasions and what he said to you, sir? A. Well, I asked him how it was going and he said there was nothing to worry about; that it was one of those things that would probably stay on the books for five or six years and then just be dis- (686) missed.

Q. Did there come a time when you got another lawyer? A. Yes, sir.

Q. When was that, sir? A. That was about two months ago.

Q. Did you ever have any conversation with Mr. Switzer on the subject of a conflict of interest? A. Yes, sir.

Q. Would you tell us what that conversation was? A. Well, he said that he couldn't understand where the conflict of interest was. He said that as far as he was concerned when he got up on the witness stand he would definitely say that I was certainly not involved.

Mr. Stim: Will you talk a little louder.

Q. During this time was the subject of conflict of interest discussed? A. Yes.

Q. Between whom? A. Between Mr. Switzer and myself.

Q. How did that subject come up? A. Well, I had not been coming into New York whenever the case was called up because I do live in (687) Massachusetts and a few months ago I had to come into New York because, as I understand it, the judge wanted Mr. Switzer and myself to have separate representation because of the conflict of interest. I didn't understand what they meant by it in legal terms and I asked Mr. Switzer, and he said it didn't mean anything; as far as he could see there was no con-

flict of interest, and when he got up on the witness stand he would certainly say I wasn't involved in anything.

Mr. Schwartz: No further questions.

Cross examination by Mr. Stim:

Q. When Mr. Switzer talked to you on the phone in the early part of January of 1950, did he tell you that he will possibly be able to put you in a position where you will be able to better yourself? A. Yes, sir.

Q. At that time you were married and you are married now? A. Yes, sir.

Q. You have four children? A. Yes.

Q. You were his wife's brother-in-law? A. Yes, sir.

Q. And you had an irregular provisional position (688) with the Post Office. You did not have a regular position. A. Yes, sir.

Q. Did he tell you that they were going to organize a new corporation? A. Yes, sir.

Q. And that that corporation will do business in the rural districts of Pennsylvania? A. Yes, sir.

Q. On that lay-away plan? A. Yes, sir.

Q. Did he explain that to you? A. Yes, sir.

Q. Did he tell you you would be able to learn the business and, if the business prospers, you will get an interest in it? A. Yes, sir.

Q. And then you came into New York. He brought you here. Now, you then became connected with the Berkeley Pennsylvania Corporation? A. Yes, sir.

Q. You testified on direct that Mr. Faskow ran the business? A. Yes, sir.

(689)

Q. And he was getting, you said, $100 a week? A. About that.

Q. You got $75 a week? A. Yes, sir.

Q. And his daughter, Renee, she kept the records and was at the place during the day? A. Yes, sir.

Q. Now, nobody but you signed checks, isn't that so? A. Yes, sir.

Q. Mr. Faskow didn't sign any checks? A. No.

Q. You were the sole one who could sign any checks? A. Yes, sir.

Q. Now, when the new corporation began operating under you, or, rather, with you as president, did you take over certain cards of accounts with the people in Pennsylvania that the old corporation had? A. Yes, sir.

Q. Now, isn't it a fact that most of these cards, if not all of them, represented accounts from whom the old corporation obtained money and to whom they owed merchandise? (690) A. Yes, sir.

Q. In other words, the new corporation took over the liabilities of the old corporation to these accounts? A. Yes, sir.

Q. And it was the new corporation that collected the balance, isn't that so? A. Yes.

Q. And then out of its own stock paid the merchandise which was owing to these accounts? A. Yes, sir.

Q. In other words, let me ask you to make it clear. Let us assume somebody in Pennsylvania entered into a contract with the old corporation to buy a watch for $52 and they agreed to pay $1 a week and at the time when the new corporation was organized he paid $12 against

that $52. The new corporation would collect the balance; is that so? A. Yes, sir.

Q. But also assumed the liability for the $12? A. Yes, sir.

Q. Then it would deliver at the end of the contract the merchandise which was contracted for? A. Yes, sir.

(691)

Q. Can you give us an idea of about how many of these liabilities of the old corporation were taken over by the new corporation? Would it be $10,000? A. Frankly, I couldn't say how much there was involved.

Q. There were about 1000 accounts, I understand, or, rather cards with accounts. A. There were quite a few. I wouldn't know.

The Court: Did you handle those cards?

The Witness: Miss Faskow took care of most of the bookkeeping. There were a great many cards. I wouldn't venture to say how many cards there actually were but there were a lot of them.

By Mr. Stim:

Q. Now, when Mr. Switzer spoke to you about that Lipson merchandise which was sold, did he tell you that it was collateral merchandise on loans from Bucknell Trading Corporation that Berkeley Jewelers, the old corporation, owed to Bucknell? A. I am sorry, would you please repeat that.

Q. You testified that you went to the house of Lipson? A. Yes, sir.

(692)

Q. And you saw there certain merchandise for sale on display for prospective buyers; do you remember that? A. Yes, sir.

Q. And later on you said that Mr. Switzer told you that was the property of Berkeley? A. Yes, sir.

Q. Berkeley Jewelers? A. Yes, sir.

Q. Did he tell you at that time that it was merchandise which Berkeley pledged with Bucknell as collateral for loans? A. Well, that I didn't know.

Q. You did not know that? A. No.

The Court: The question is, did he tell you that?

The Witness: No.

The Court: He did not tell you that?

The Witness: No, not that I recall.

By Mr. Stim:

Q. Did he ever use, in conversations with you about merchandise, the term or the words "trust receipts"? (693) A. Trust receipts?

Q. Yes. A. No, sir, I don't recall.

Q. Now, these occurrences that you testified about happened about six years ago? A. Yes, sir.

Q. It was only about two months ago, isn't that so, that Judge Lauritano became your lawyer? A. Yes, sir.

Q. And was that the first time, after he became your lawyer, that you gave a statement to the district attorney? A. Yes, sir.

Q. That was about two months ago? A. Yes, sir.

Q. When you came to Mr. Schwartz' office, the district

attorney's office, was there anybody there with Mr. Schwartz? A. The gentleman besides him.

Q. Did they read to you the statements given by Mr. Faskow or Mr. Shulman? A. No, sir.

Q. You knew that Mr. Shulman and Mr. Faskow at that time were also giving statements to the United (694) States Attorney? A. No, sir, I did not.

Q. Didn't you know that at that time Mr. Shulman and Mr. Faskow made a disposition or agreed to plead guilty? A. I had heard that—Mr. Switzer told me that he thought that they were going to plead guilty, but I had never heard anything official. I never knew definitely that either one of them had.

Q. While you were connected with Berkeley Pennsylvania Corporation, did Mr. Switzer ever ask you to do anything improper in connection with that corporation's business? A. No, sir.

Q. It was a business which was continued. It purchased its own merchandise; it paid its own bills; isn't that so? A. Yes, sir.

Q. And only you were able to sign checks? A. Yes, sir.

Q. Isn't it a fact that Mr. Switzer told you that the reason he wants you to be the sole man to sign checks is in order to make sure that Mr. Faskow or anybody else does not withdraw money from the (695) corporation without authority? A. Yes, sir.

Q. Did Mr. Faskow break you in in the business? A. Yes, he taught me.

Q. Isn't it a fact that you made a few trips with him? A. I made not with Mr. Faskow——

Q. With another salesman? A. No.

Q. Whom did you make them with? A. On one occasion one of the collectors was sick and I went up to Pennsyl-

vania myself for four or five days to try to collect the accounts that were due for that week.

Q. You testified that there came a time six or eight weeks after you became connected with the corporation, with the new corporation, when you received notice of your permanent appointment to the Post Office. A. Yes, sir.

Q. And at that time you spoke to Mr. Switzer and told him that you would like to return and accept that appointment? A. Yes, sir.

(696)

Q. And didn't he tell you, "Suit your best interest and if it is better for you, then you should do it"? A. Yes, sir.

Q. And he asked you to sign some blank checks until such time as he would change the corporate setup and have somebody else sign checks? A. Yes, sir.

Q. After that did you sign any other checks besides this blank check before you left? A. No.

Q. Now when the FBI agents came down to see you in Boston, you called Mr. Switzer? A. Yes, sir.

Q. You knew he was a lawyer? A. Yes, sir.

Q. You wanted him to represent you, isn't that so, in connection with this matter? A. Yes, sir.

Q. He told you not to make any statements—— A. Yes, sir.

Q. —— to the FBI? A. Yes, sir.

Q. Did he tell you you don't have to make any (697) statements? A. Yes, sir.

Q. When you went before the grand jury were you asked certain questions? A. Yes, sir.

Q. And gave certain answers? A. Yes, sir.

Irving Shear—for Government—Cross

Mr. Stim: May we approach the bench, please? (Discussion at the bench off the record.)

By Mr. Stim:

Q. Will you tell this Court and jury what questions you were asked before the grand jury to which you gave, as you stated, false testimony?

The Court: What were you asked that you answered untruthfully?

A. Well, one of the questions they asked was who was actually running the business, and I stated that I was. I made no mention of Mr. Faskow.

Q. In other words, the business of the new corporation? A. Yes, sir.

The Court: Anything else?

The Witness: Well, in regard to the merchandise that was sold at Mr. Lipson's house, I made (698) no mention of that.

By Mr. Stim:

Q. Were you asked any question about the sales at Lipson's house? A. Not specifically at Mr. Lipson's house.

Q. You were not asked about that specific sale? A. No, sir.

Q. And you did not mention it? A. No, sir.

Q. What else? A. That was about all.

Q. In other words, this so-called false testimony consisted of that you were running the business of the new corporation without mentioning Faskow? A. Yes, sir.

Q. You were the president of that corporation? A. Yes, sir.

Q. Mr. Faskow wasn't an officer of that corporation? A. No, sir.

Q. He wasn't an employee.

The Court: Now are you arguing.

Mr. Stim: Very well, your Honor. You are (699) right.

By Mr. Stim:

Q. Then you stated you were not asked any specific question about the Lipson sales? A. No, sir.

Q. And you did not mention it? A. No, sir.

Q. And that was the extent to which you testified falsely before the grand jury? A. Yes, sir.

Q. Now, after you obtained the services of, or, rather, when Judge Lauritano was assigned to you as counsel, and after you made a statement, were you told that the case, the indictment in this case, will be severed against you? A. No, sir.

Q. When, for the first time, did you know that the Government will not proceed against you and will not require any plea before trial? A. I think that was just a few days ago that I got a letter from Mr. Lauritano stating that the case had been severed against me.

Q. You did not know anything about it? A. No, sir.

(700)

Q. Your attorney made this arrangement with the district attorney?

Mr. Schwartz: I object to that, your Honor.

The Court: You don't know anything about it.

By Mr. Stim:

Q. You received a letter? A. Yes, sir.

Q. Have you that letter with you? A. No, I have not.

Q. While you were connected with Pennsylvania, Berkeley Pennsylvania Corporation, didn't Mr. Switzer ask you to watch and make sure that Faskow took no merchandise out of the business? A. Yes, sir.

Mr. Stim: No more questions.

Re-direct examination by Mr. Schwartz:

Q. During the time that you were conducting the business of Berkeley Pennsylvania Corporation, did money come in from these accounts in Pennsylvania? A. Yes, sir.

Q. Was most of this money in the form of cash or in the form of checks? A. Well, as a rule most of it came in by check. (701) The collector, I believe, lived in Pennsylvania, and he would collect the money and send in a money order for the amount of money that he collected.

Q. Will you tell us approximately how much of this money came in every week?

Mr. Stim: I object to that. It is not an issue here at all.

Mr. Schwartz: You opened the door, Mr. Stim.

The Court: I will allow it

Mr. Stim: There is no charge that there was a concealment of assets of that corporation.

The Court: I will allow it.

A. I honestly don't remember how much money came in on the accounts.

Q. Well, what did you use for money to buy the merchandise, to service these accounts? A. Well, I took the money and deposited it in the bank, usually on Saturday, I believe it was; I would write out a check for the amount due to each of the salesmen and I wrote a check for the fellow who worked there and for myself and for Mr. Faskow also. I can't remember, with Mr. Faskow, whether I wrote a check for him or if it was in cash, be- (702) cause on occasion there was cash that came in. It wasn't all check.

Q. And what did you use for money to buy the merchandise for these people? A. From the money that came in.

Q. So that from the money that came in you were able to buy whatever merchandise you needed? A. Yes, sir.

Q. And you were able to pay yourself $75 a week? A. Yes, sir.

Q. You were able to pay Alfred Adler $35 or $40 a week? A. Yes, sir.

Q. And Mr. Faskow was able to take out $100 a week? A. Yes, sir.

Q. And that is the way the business operated? A. Yes, sir.

Q. Now on the basis of that, would you say that these cards and accounts which you had in these accounts in Pennsylvania were liabilities or assets?

Irving Shear—for Government—Re-direct

Mr. Stim: I object to that.

The Court: Sustained.

Now we are going to get into his knowledge (703) of accounting. You can argue this to the jury.

By Mr. Schwartz:

Q. Did Berkeley Pennsylvania Corporation owe any money or any merchandise to any people on these accounts at the time they went into business? A. Well, they took over the accounts of the old corporation and a lot of orders we did fill when they were completely paid for.

Q. Did you, as president of this corporation sign any papers by which the Berkeley Pennsylvania Corporation agreed to be liable for any debts of any other corporation? A. Not that I recall.

Mr. Stim: I object to that, your Honor.

The Court: Overruled.

A. Not that I recall.

Mr. Schwartz: No further questions.

By the Court:

Q. Did you ever look at these cards? A. Yes, sir.

Q. Did you ever see whether those cards indicated in any instance that the person whose name appeared on the card had paid in $10 or $20 and had some due to be collected weekly before the person (704) would be entitled to get the merchandise? A. Yes, sir.

Q. There were such cards? A. Yes, sir.

The Court: You may step down.
(Witness excused.)

* * * *

(705) * * *

MORRIS LEWIS, called as a witness by the Government, being first duly sworn, testified as follows:

Mr. Schwartz: May we have this marked for identification, please?

(Marked Government's Exhibit 17 for identification.)

Direct examination by Mr. Schwartz:

Q. Mr. Lewis, what business are you in? A. Trucking business.

Q. What is the name of your business? A. L & L Delivery.

Q. Where are they—here in the city? A. Yes, sir.

Q. Were you engaged in the same business in the (706) month of January, 1950). Yes, sir.

Q. Do you recall whether one of your customers at that time was a man by the name of Harry Green? A. Yes.

Q. Did you during the month of January, 1950, receive a telephone call from Mr. Green? A. I did.

Q. Did you have a conversation with him at that time? A. I did.

Q. Following that conversation what did you do? A. Following the conversation I sent a truck before I sent

a truck, a man by the name of Morris Switzer called me up and wanted to know when I was sending the truck.

Mr. Stein: I would like a foundation laid.

Mr. Schwartz: I consent to striking the portion of his testimony——

The Court: Did there come a time when you sent a truck any place to pick up?

The Witness: Yes, sir.

The Court: Where?

The Witness: To 29th Street.

(707)

By Mr. Schwartz:

Q. Was that the store of Berkeley Jewelers, Inc.? A. Yes.

Q. Where did the truck take this merchandise? A. The truck took it to 37 West 19th Street.

Q. What was 37 West 19th Street? A. National Plastic, Harry Green's place.

Q. I show you Government's Exhibit 17 for identification and ask you does this refresh your recollection as to whether or not some merchandise was taken by this truck some place else than the premises of Harry Green? A. No. From Berkeley it went down to——

Q. I call your attention to the address on that. A. 1123 Broadway.

Q. Does that refresh your recollection that any merchandise was taken to some other place? A. 1123. There is a receipt.

Q. 1123 Broadway? A. Yes.

Q. Was there more than one place where this was taken?

Morris Lewis—for Government—By the Court

By the Court:

Q. Did you deliver all your tickets to one place? (708) A. Yes.

Q. Did you deliver part of it at one place and part at another place? A. No, 1123 Broadway.

Q. National Plastics? A. No, Berkeley Clothes—Berkeley Jewelers.

Q. Did you pick it up at Berkeley Jewelers? A. No. We picked it up at 29th Street.

By Mr. Schwartz:

Q. And you delivered it to a place called Berkeley Jewelers? A. Yes.

Q. And that was a place at 1123 Broadway, New York City? A. Yes, sir.

Q. Did you ever deliver any other merchandise to 37 West 19th Street? A. One load.

Q. One load? A. Yes.

Q. Was that also merchandise that you picked up at 29th Street? A. That is right.

Q. Did there come a time when you received a (709) telephone call from a man named Morris Switzer? A. I did.

Q. Did you have a conversation with that man? A. I did.

Q. Did you subsequently meet that man and speak to him in person? A. I did.

Q. And do you see that man here in this courtroom? A. I do. The second man.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer?

Morris Lewis—for Government—Direct

By Mr. Schwartz:

Q. Now will you tell us what Mr. Switzer said to you on this telephone call and what you said to him? A. He asked me if I can move two loads, and I told him I couldn't do it during the day but I would do it around 5 o'clock, 6 o'clock, when the trucks came back. We took the two loads from 37 West 19th Street and we delivered them to the—the following day, that is, they were delivered to 17 Hubert Street, Piken's Warehouse.

Q. Is that also in New York City? A. New York City.

Q. Was any merchandise taken any place else? (710) A. Yes, one load was taken to Pitkin Avenue.

Q. In Brooklyn? A. Yes.

Q. Do you know whose place that was? A. I wouldn't remember, no.

Mr. Schwartz: No further questions.

* * * *

Louis Lipsey, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What business were you in in the month of January, 1950? A. I was manufacturing dinette furniture.

Q. Where was it located? A. Brooklyn.

Q. Do you know a man named Morris Switzer? A. Yes.

Q. Do you see him anywhere in the courtroom? A. Yes.

Louis Lipson—for Government—Direct

(711)

Mr. Schwartz: May the record show the identification of Morris H. Switzer?

By Mr. Schwartz:

Q. How long have you known Mr. Switzer? A. About ten years.

Q. Did he ever represent you as an attorney? A. On one occasion.

Q. Did you in the month of January, 1950, receive a telephone call from Mr. Switzer? A. Somewheres about that time, some time back about that time.

Q. Did you have a conversation with him about that time? A. Yes.

Q. What did you say to him and what did he say to you? A. He asked me if I had some storage space for a little while for some merchandise, and I told him I had. And he asked me if he could use it, and I said, "Yes." That was the end of the conversation.

Q. Now, following that, did there come a time when merchandise was shipped to your storage space? A. I wasn't at the place at the time but the (712) stuff was brought in and stored there.

Q. Did it remain there for a period of time? A. Yes, it did.

Q. Was it then removed? A. Yes.

Q. Do you recall how long it stayed there? A. It is hard for me to remember that far back. I don't remember exactly.

Mr. Schwartz: No further questions.

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ALFRED ADLER, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. Mr. Adler, keep your voice high enough so that the last juror in the box can hear you? A. I will.

Q. For whom did you work, between April, 1949, and January, 1950? A. Berkeley Jewelers.

Q. Where was Berkeley Jewelers located? A. 44 East 29th Street, New York.

Q. Who was your boss? (713) A. Mr. Albert Faskow.

Q. What was the business of Berkeley Jewelers? A. It was a retail jewelry and appliance store with accounts on the road, discount house.

Q. Did they have a showroom? A. Yes, they did.

Q. About what size was the showroom? A. Well, it was a particular size. I couldn't tell you the dimensions.

Q. About how deep was it, sir? A. Well, it was fairly—it was long. It wasn't too wide. It was a big size, though.

Q. Would you say it was as much as 75 feet deep? A. I would say about that, approximately.

Q. Would you say it was as much as 20 feet wide? A. It is probable that is about the dimension.

Q. Did this showroom contain wall cases and showcases?

Mr. Stim: I object to the leading.

The Court: Overruled.

Q. Did this contain showcases and wall cases? A. Yes, sir.

Q. Was there merchandise on display in these (714) cases? A. Yes, there was.

Q. Was there a safe? A. Yes, there was.

Q. Was there an office? A. Yes, there was.

Q. Was merchandise kept any place other than in the showroom and in the safe which you have described? A. Yes.

Q. Where else? A. In the stockroom.

Q. Where was the stockroom? A. That was a room beyond the showroom.

Q. About how big was this stockroom? A. I couldn't say any dimensions.

Q. Was it as big as the showroom? A. It was a little smaller.

Q. A little smaller than the showroom? A. Yes.

Q. Were there shelves in the stockroom? A. Yes.

Q. How was the stockroom separated from the showroom? A. There was a door separating the two.

(715)

Q. Was there a lock on that door? A. Yes.

Q. Now calling your attention to the month of January, 1950, which was the last month that you were employed by that corporation, was most of the merchandise at Berkeley, Jewelers, Inc. kept in the showroom or in the stockroom? A. In the stockroom.

Q. What was kept in the showroom? A. Jeweiry, silverware, rings, watches, clocks, things pertaining to that nature.

Q. Now, what kind of watches were sold in the Berkeley Jewelers in the month of January, 1950? A. Longines-Wittnauer, Le Coultre, Elgin, Bulova; name brand watches.

Q. Any gold watches? A. Yes, sir.

Q. Any diamond watches? A. Yes, sir.

Alfred Adler—for Government—Direct

Q. Was there any other diamond jewelry sold there? A. Yes.

Q. What kind of diamond jewelry? A. Rings, necklaces. Then there was novelty (716) jewelry.

Q. Where was the diamond jewelry kept? A. In the safe, some in the showcase.

Q. Did any diamond jewelry remain in the showcase at night? A. No.

Q. What was done with it at night? A. It was put into the safe.

Q. Was the store fairly well stocked with merchandise in the month of January, 1950? A. Yes.

Mr. Stim: I object to these leading questions.

The Court: Overruled.

A. Yes.

Q. Now, what kind of merchandise was kept in the stockroom during the month of January, 1950? A. Radios, clocks, silverware, appliances. All heavy appliances, rotisseries, broilers, toasters, things of that nature. Watches.

Q. Was the stockroom fairly well filled during the month of January, 1950? A. Yes, sir.

Q. Do you know a man named Morris Switzer? (717) A. Yes.

Q. Do you see Mr. Switzer anywhere in this courtroom? A. Yes, sir. I do.

Q. Will you point him out, sir? A. There.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer?

The Court: Yes.

Alfred Adler—for Government—Direct

By Mr. Schwartz:

Q. When did you first meet Morris Switzer? A. In April, 1949, when I started to work for Berkeley Jewelers.

Q. Did you see him subsequently to that? A. Yes.

Q. About how often did you see him? A. About two or three times a week.

Q. Where did you see him during this period? A. Berkeley Jewelers.

Q. What was he doing there? A. He came to see Mr. Faskow.

Q. Did he have conversations with Mr. Faskow on those occasions? A. Yes.

(718)

Q. Do you know a man named Jack Shulman? A. Yes.

Q. Who was Mr. Shulman? A. He was a friend of Mr. Switzer.

Q. When did you first meet him? A. Also in April, 1949.

Q. Did you see him thereafter? A. Yes.

Q. Where did you see him thereafter? A. Berkeley Jewelers.

Q. What was he doing there? A. He came up to see Mr. Faskow.

Q. Now did you report for work at Berkeley Jewelers on Saturday, January 28, 1950? A. I did.

Q. What time of day did you get there? A. About 10 or 10:30 in the morning.

Q. Did you recognize anyone there when you arrived? A. Yes.

Q. Who was there? A. Mr. Faskow, his daughter, Renee Faskow, Mr. Switzer and Mr. Shulman.

Alfred Adler—for Government—Direct

Q. Did you have a conversation with anyone at (719) that time? A. Yes.

Q. With whom? A. With my boss, Mr. Faskow.

Q. What did he say to you and what did you say to him? A. Mr. Faskow told me that the stock was sold at auction and I should help in packing the merchandise.

Q. Did you subsequently assist in the packing of that merchandise? A. Yes.

Q. And who else worked with you? A. Mr. Faskow, his daughter, Mr. Shulman, Mr. Switzer was there too.

Q. How long did you stay packing merchandise on that day? A. I stayed until 9 o'clock at night. I left; I had a date.

Q. Did anyone stay after you left? A. Yes.

Q. Who stayed? A. Mr. Faskow's daughter, Mr. Switzer, Mr. Shulman.

Q. Did you ever hear of a concern called Berkeley (720) Pennsylvania, Inc.? A. Yes.

Q. When was the first time you heard of this corporation? A. The same night, Saturday night.

Q. Who told you about the Berkeley Pennsylvania Corporation? A. Mr. Faskow.

Q. What did he tell you about? A. He told me that Berkeley Jewelers was firing me and I would be hired by Berkeley Pennsylvania.

Q. Did he tell you who your new boss would be? A. Yes.

Q. What did he tell you about that? A. He told me I would be working for a man called Mr. Shear, Irving Shear.

Q. Did you report to work at Berkeley Jewelers, or at their store, the following day, January 29, 1950? A. Yes, I did.

Q. What time did you get there? A. About 12 or one o'clock in the afternoon.

Q. Did you see anyone there when you arrived? A. Yes, I did.

Q. Who was there? (721) A. Mr. Faskow, his daughter, Mr. Switzer, and Mr. Shulman.

Q. What did you do when you got there? A. I continued wrapping the cartons, the merchandise.

Q. Now, did you report for work at the store of Berkeley Jewelers on 29th Street on the following day, which was Monday, January 30, 1950? A. Yes, I did.

Q. What time did you get there that day? A. About 9:30.

Q. Whom did you see there at that time? A. Mr. Ackerman.

Q. Who was Mr. Ackerman? A. He was—I saw him the week before, he came up to Berkeley Jewelers.

Q. Was he there all through the previous week? A. Yes. Before that I never saw him.

Q. What happened when you met Mr. Ackerman on Monday, the 30th of January? A. Well, I was there. About 10 o'clock Mr. Faskow's daughter came.

Q. All right. Now did there come a time when the telephone rang? (722) A. Yes.

Q. Who answered the telephone? A. Mr. Ackerman.

Q. Did he have a conversation with the person on the other end? A. Yes.

Q. Did he thereafter speak to you? A. Yes.

Q. What did he tell you?

Mr. Stim: I object to that, your Honor.

Mr. Schwartz: I withdraw the question.

By Mr. Schwartz:

Q. Did he thereafter have a conversation with you? A. Yes.

Q. What did you do after that conversation? A. I went down into the street and the truck came by.

Q. Did you recognize anyone when you went down to the street? A. Yes.

Q. Whom did you recognize? A. Mr. Switzer.

Q. Was anybody there with him? (723) A. Yes.

Q. Where were they standing? A. A few doors away inside the doorway of a store.

Q. What happened when you recognized Mr. Switzer? A. He called me over.

Q. Did you have a conversation with him at that time? A. Yes, sir. I did.

Q. What did he say to you? A. He told me I should tally the amounts of cartons going into the truck and give him the tally.

Q. Did he say anything else? A. Yes.

Q. What did he say? A. He told me he would remain there. He didn't want to be seen.

Q. What did you do after your conversation with Mr. Switzer? A. I went back and I kept count of the cartons going into the truck on a piece of paper.

Q. Did there come a time when the truck was loaded? A. Yes.

Q. What did you do when that happened? (724) A. I gave Mr. Switzer the tally.

Q. What did Mr. Switzer do? A. He gave me $5 to go upstairs to buy lunch for myself, Mr. Ackerman and Renee Faskow.

Q. Did you subsequently have lunch with these people? A. Yes.

Q. What did you do after lunch? A. After lunch I went to Berkeley Pennsylvania.

Q. Where was that? A. On 25th Street and Broadway.

Q. Did you meet anyone there that you knew? A. Yes. I met Mr. Shear, Mr. Switzer and Mr. Ackerman.

Q. Did there come a time when a truck arrived at the building of Berkeley Pennsylvania, Inc.? A. Yes.

Q. Did you have a conversation with anybody about that? A. I was told to——

Q. By whom? A. By Mr. Faskow—to put the merchandise in the office.

Q. Was anyone else present when you received (725) these instructions? A. Yes.

Q. Who? A. Mr. Switzer and Mr. Ackerman.

Q. Did you subsequently perform that task? A. Yes, sir.

Q. What happened after that? A. I went back to Berkeley Jewelers.

Q. What did you do when you got there? A. I took another count of the merchandise being put into the truck. The truck went back to Berkeley Jewelers.

Q. Now did there come a time when a car drove by? A. Yes.

Q. When was that? A. About half past 4 in the afternoon.

Q. Where were you at that time? A. I was in front of the Berkeley Jewelers building.

Q. Did you recognize anyone in that car? A. Yes.

Q. Whom did you recognize? A. Mr. Switzer and his wife.

(726)

Q. Did you have a conversation with Mr. Switzer at that time? A. Yes.

Q. What did you say to him and what did he say to you? A. I gave him the tally, the count, and he told me he would send the truck on to Berkeley Pennsylvania and I should go home and call Mr. Faskow's daughter the next morning.

Q. Now, the next morning was Tuesday, the 31st of January, 1950? A. That is correct.

Q. Now, what did you do on the morning of that day? A. I went to Berkeley Jewelers in the morning.

Q. Did you meet anyone there? A. Yes.

Q. Whom did you meet? A. Mr. Ackerman.

Q. Did you have a conversation with him at that time? A. Yes.

Q. Following that conversation what did you do? A. We went around the corner to Madison Avenue (727) for a cup of coffee.

Q. Did you meet anyone there? A. Yes.

Q. Whom did you meet? A. Mr. Switzer and Mr. Faskow and Mr. Shear.

Q. Where were they? A. They were in a car on Madison Avenue.

Q. Did you have a conversation with anyone at that time? A. Yes, sir.

Q. With whom? A. Mr. Switzer gave me the key to go upstairs into the building.

Q. Did he say anything at that time? A. Just go about my business, clean up, take the phone calls and messages.

Q. Did you do that? A. Yes.

Alfred Adler—for Government—Direct

Q. What did the people in the car do? A. They drove away.

Q. When you got up to the store, did you receive any telephone calls? A. Yes, I did.

Q. From whom were these telephone calls? (728) A. From customers, creditors.

Q. Did you have conversations with these people who called up? A. Yes.

Q. Did there come a time that day when you received another telephone call from Mr. Switzer? A. Yes, sir.

Q. What did you say to Mr. Switzer and what did Mr. Switzer say to you? A. I told him of the phone calls I received.

Q. What did he say to you? A. He told me I should go home and call Mr. Faskow's daughter the next morning.

Q. Now, Wednesday morning was February 1, 1950. What did you do on the morning of that day? A. I called up Mr. Faskow's daughter.

Q. Did you have a conversation with her? A. Yes.

Q. Following that conversation what did you do? A. I walked down to the corner where I lived.

Q. Now, what, if anything happened after that? A. Yes.

Q. What happened after that? A. A car drove by with Mr. Switzer in it.

(729)

Q. What happened when this car drove by? A. I got in.

Q. Did you recognize anyone else in the car? A. Yes.

Q. Who? A. Mr. Switzer's daughter and Mr. Shear.

Q. Now what happened when you got into the car? A. We drove off.

Q. Did you pick anybody else up? A. We picked up Mr. Ackerman and Mr. Faskow.

Q. Then what did you do? A. We drove to New York.

Q. Did you drop anybody off? A. Yes.

Q. Who? A. Mr. Switzer's daughter.

Q. What was your next move? A. We went to a courthouse in New York.

Q. Did anybody get out there? A. Yes.

Q. Who. A. Mr. Switzer.

Q. What did he do when he got out? A. Pardon me?

(730)

Q. Where did he go when he got out of the car? A. Into the courthouse.

Q. What did you do? A. We remained in the car.

Q. Did there come a time when you left the car? A. Yes.

Q. When was that? A. A policeman came and told us we would have to move the car.

Q. What did you do about that? A. I went into the courthouse to see if I can find Mr. Switzer.

Q. Did you find Mr. Switzer? A. Yes.

Q. And did you have a conversation with him at that time? A. Yes.

Q. What did you say to him and what did he say to you at that time? A. I told Mr. Switzer who called him the previous day, the phone calls.

Q. What did he say to you? A. He told me I should not tell anyone any of my business because I only work for Berkeley Jewelers (731) and whatever I do is all right.

Mr. Stim: I can't hear.

A. He told me I only work for Berkeley Jewelers. I don't have to tell anyone anything. If anyone asks me anything, I can refer them to Mr. Switzer.

Q. Did there come a time when you got back into the car? A. Yes.

Q. Where did you go from there? A. We drove to 14th Street to the Amalgamated Bank.

Q. What happened when you got to the Amalgamated Bank on 14th Street? A. Mr. Faskow and Mr. Switzer got out and I remained in the car.

Q. Did there come a time when they came back? A. Yes.

Q. What did you do then? A. We drove back to Berkeley Jewelers and we picked up Mr. Ackerman.

Q. Where did you go from there? A. To Berkeley Pennsylvania.

Q. What did you do when you got to Berkeley Pennsylvania? (732) A. We started to sort out the merchandise.

Q. Did you have a conversation with anyone at that time? A. Yes.

Q. With whom? A. With Mr. Faskow.

Q. What did he tell you? A. He told me that I am now working for Mr. Shear. I would take orders from Mr. Shear.

Q. Did you thereafter work for some time for the Berkeley Pennsylvania Corporation? A. I did.

Q. How long did you continue to work for the Berkeley Pennsylvania Corporation? A. For about two or three months.

Q. Who was the president of the Berkeley Pennsylvania Corporation? A. Mr. Irving Shear.

Q. Who else worked over there? A. Renee Faskow and myself.

Q. Did you ever see Mr. Albert Faskow over there? A. Yes.

Q. How often did he come in? A. He came in in the evening or on a weekend.

(733)

Q. What did he have to do with the business? A. Well, he saw that the orders were filled and he ordered merchandise when we needed it.

Q. Well, who was actually running the business? A. Mr. Shear. Mr. Shear was the president of the corporation.

Q. Did you have any conversation with Mr. Shear about his duties? A. Yes.

Q. What did he say to you and what did you say to him? A. Mr. Shear said that he has no say in the business, that the final say was up to Mr. Switzer.

The Court: Do you want the answer read?

By Mr. Schwartz:

Q. Did there come a time when you were discharged by Berkeley Pennsylvania Corporation? A. Yes.

Q. Who discharged you? A. Renee Faskow.

Mr. Schwartz: No further questions.

* * * *

(757) • • •

MILTON ACKERMAN, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What business were you in during the month of January, 1950? A. In the cabinet-woodworking business.

Q. What was the name of your business? A. Quaker Wood Industries.

Q. Keep your voice up so that everyone in the room can hear you, sir. A. Yes.

Q. Do you know a man named Morris Switzer? A. Yes, I do.

(758)

Q. Do you see Morris Switzer anywhere in this room? A. Yes.

Q. Will you point him out, sir? A. Right over there.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer?

The Court: Yes.

By Mr. Schwartz:

Q. Is Mr. Switzer related to you through marriage? A. I believe he is.

Q. Is he related to your father-in-law? A. Yes.

The Court: Is he what?

Mr. Schwartz: "Is he related to your father-in-law?" and the witness answered "Yes."

Milton Ackerman—for Government—Direct

Q. How long have you known him? A. Approximateiy 10 years.

Q. How did you first come to meet him, sir? A. Well, Mr. Switzer represented me in a divorce litigation.

Q. Did there come a time when you were retained to act as custodian of the property of Berkeley Jewelers, (759) Inc. at 44 East 29th Street in New York City? A. Yes.

Q. Was that in the month of January, 1950? A. Yes.

Q. Who hired you to act as custodian for the property of Berkeley Jewelers, Inc.? A. Mr. Switzer.

Q. Did you thereafter act as custodian for about a week during that month? A. Yes.

Q. Did you have a key to the premises? A. Yes.

Q. Who gave you your instructions during that period? A. The marshal gave me the instructions.

Q. Who? A. Mr. Switzer and the marshal.

Q. Mr. Switzer and the marshal? A. Yes.

Q. Did you get paid for your services as custodian? A. Yes, I did.

Q. Who paid you for your services? A. Mr. Switzer.

Mr. Schwartz: No further questions.

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(760) * * *

Edward Klein, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. By whom are you employed at present? A. E. M. Stevens Corporation.

Q. Where are they located, sir? A. 249 Old Country Road Carle Place, Long Island, New York.

(761)

Q. Mr. Klein, will you please keep your voice up so that the last juror in the box can hear you.

By whom were you employed during the month of January, in the year 1950? A. Latama Cutlery, Inc.

Q. Did Latama Cutlery, Inc. have an office for the transaction of business? A. Yes, sir, at 1133 Broadway.

Q. When did they move into this office at 1133 Broadway? A. At the very beginning of January, around the 2nd or 3rd of January, 1950.

Q. Do you recall the suite number of that office? A. Yes, 617.

Q. Did there come a time when the Latama Cutlery Company became interested in subletting a portion of the suite? A. About the second week of the month of January we decided to let out a section of the space, if possible. We placed advertisements.

Q. Where did you place the advertisements? A. I believe in the New York Times.

Q. Now, was there any response to the advertisements you inserted in the newspapers? (762) A. Yes, there was a few responses. A. Mr. Shulman came up to see us.

Q. Is that a Mr. Jack Shulman? A. I don't recall the first name but I remember it is a Mr. Shulman, a young man.

Q. Did you speak to Mr. Shulman at that time? A. Yes, I happened to speak to him myself.

Q. Will you tell us what the conversation was with Mr. Shulman at that time? A. He looked over the space that we had available and said he thought it would do

for what he had in mind and that he would like to bring some of his associates over to see the space either later in the day or the next day, and he left us a $10 deposit.

Q. Did he tell you for what purpose he and his associates desired to lease this space? A. I don't know exactly what his words were, but we told him the only thing the space could be used for was as a showroom and office and that there could not be any shipping or anything of that nature there because it wasn't set up for it, and I believe he said that would be adequate.

Q. Did there come a time when you met the associates of Mr. Shulman? (763) A. Yes. It wasn't too long thereafter, either later in the day or the next morning that Mr. Switzer and Mr. Faskow came up to see the space and they agreed that it was all right.

Q. Do you see Mr. Switzer anywhere in this courtroom? A. Yes, sitting at the table there.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer?

The Court: Yes.

Q. Did you have a conversation with Mr. Switzer and Mr. Faskow when they came up? A. Yes, a very short conversation as to going over the details of the lease we wanted and the rental and so forth, and it was agreed to a rental of about $135 a month.

Q. Is that $135 a month? A. Yes, $135 a month for a period of three years.

Q. Was that rental and that term of lease agreed to at the time? A. It was agreed to, and I believe we said that it would take a few days for our attorney to get the lease drawn up, and they said when it was ready to call them and they would come over and sign it.

(764)

Q. Now, did there come a time when you met Mr. Faskow and Mr. Switzer again? A. Yes, I saw Mr. Faskow. Of course, once they started to conduct the business in our place Mr. Faskow was in most every day and Mr. Switzer was in rarely but from time to time.

Q. Did you have any further conversations with Mr. Faskow or Mr. Switzer prior to the time that the lease was entered into? That is, did you have any conversation prior to the time that the lease was signed? A. No, I don't believe we had anything.

Q. Who signed the lease? A. A Mr. Shear, as I believe, who came down with them at the time to sign the lease. He would sign as president of the business.

Q. What was the name of the business that Mr. Shear signed as president of? A. I would say it may have been Berkeley Pennsylvania or——

Q. Something like that? A. —something like that.

Q. Was anybody else present when Mr. Shear signed his name as the president of Berkeley Pennsylvania? (765) A. I think I recall Mr. Faskow being there.

Q. Was Mr. Switzer there? A. I am not certain that Mr. Switzer was there or not.

Q. Now did this new corporation do business at Suite 617, 1133 Broadway, for some time thereafter? A. Yes, as long as we were there.

Q. Did there come a time when merchandise was delivered to the premises of the Berkeley Pennsylvania Corporation? A. Yes, not too long after the signing of the lease I would say a substantial amount of merchandise was brought into the premises, and I recall coming down and complaining somewhat about it because we did not

have facilities to take care of that sizable amount of merchandise.

Q. To whom did you complain about it? A. Mr. Faskow.

Q. Did you complain to anybody else about it, sir? A. Mr. Faskow, a young fellow that was working for him at the time. I forget his name.

Q. What did you say? A. I told him that we had rented this space (766) purely as a showroom and that there were not adequate facilities for handling of stock, just a small, little stockroom, and you couldn't put too much in there, and we didn't want our showroom to be looking the way it would have to appear with all the goods that was in there.

Q. What did Mr. Faskow say? A. Mr. Faskow said they just brought it over there to clean it out and take out the samples and put them on the shelves, and they would remove the rest of it in a matter of a few days, which they subsequently did.

Q. How long did you stay with the Latama Cutlery Company in 1950? Did there come a time in that year when you left the employ of that company? A. No, I didn't leave the company at that time but we moved. I don't recall the date we moved or when we moved. It was, I think, quite late in 1950.

Q. Did there come a time late in 1950 when the Latama Cutlery Company moved? A. We moved out. We moved up to 256 West 55th Street.

Q. Prior to this time the business of Latama Cutlery Company was being conducted in the same suite (767) of offices as the business of the Berkeley Jewelers was being conducted? A. Yes, sir.

The Court: Berkeley Jewelers?

Mr. Schwartz: Berkeley Pennsylvania. I am sorry.

Q. Now, who was manager of the Berkeley Pennsylvania Corporation during the period that you shared space with them? A. I would say Mr. Faskow.

Q. Who else was working? A. His daughter, younger daughter.

Q. Anybody else? A. Not that I can recall.

Q. How about Mr. Shear, the president? A. Oh, we saw him very rarely, maybe two or three times, after the lease was signed.

Mr. Schwartz: I have no further questions.

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(770) * * *

CARL JOHANSEN, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What do you do for a living, Mr. Johansen? A. I am an elevator operator.

Q. By whom are you employed, sir? A. Glenmore Management.

Q. Where do you operate your elevator? A. 44 East 29th Street, Manhattan.

Q. How long have you operated an elevator at 44 East 29th Street? A. Since October, 1949.

Q. Was there a time when you were working there that

there was a tenant named Berkeley Jewelers, Inc. at 44 East 29th Street? A. Yes.

Q. Do you recall approximately when that was? A. That was the month of January, 1950. The end of January, 1950.

Q. Do you know a man named Morris Switzer? (771) A. Yes.

Q. Do you see Morris Switzer anywhere in this room? A. I believe he is sitting right over there.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer?

The Witness: Yes, right there.

By Mr. Schwartz:

Q. Who is Morris Switzer? A. He came into the building going up to the second floor. Now, who he is I don't know; what he had to do with Berkeley Jewelers.

Q. Over what period of time did he come into the building going up to the second floor? A. Oh, October, November, December of 1949, and January, 1950.

Q. How often during these months did he use to go up to the second floor? A. Oh, that. Well, I saw once a day, three times a week, or four times a week. I can't say.

The Court: Several times each week?

The Witness: Several times, yes.

Q. Now, during the month of May, 1950, what was the condition of the store that Berkeley Jewelers used to occupy? (772) A. Well, what was there was the show counters, showcases, fluorescent lights and the one safe.

Q. There were no new tenants in there at that time? A. No, no, sir.

Q. Did there come a time during the month of May, 1950, that you saw Mr. Switzer again? A. Yes, the month of May I did, yes, sir, 1950.

Q. Did he come into the building at 44 East 29th Street at that time? A. Yes, he did.

Q. And did you have a conversation with him at that time? A. All he said to me was he wants to go up to the safe; he has the combination and he wants to take out what is in there in the safe.

Q. Did you take him up to the second floor? A. I took him up to the second floor, I did.

Q. What did he do when you took him up to the second floor? A. He walked down to the safe, he opened the safe, I was about 20, 25 feet from him, and he took out whatever was in there, in the safe, and he came up to me and I took him down.

(773)

Mr. Schwartz: No further questions.
Excuse me, one more question.

By Mr. Schwartz:

Q. Was there anyone with Mr. Switzer? A. No, he came all alone.

Mr. Schwartz: No further questions.

Cross examination by Mr. Stim:

Q. Between January, 1950, when Berkeley Jewelers moved out, and May, 1950, when Mr. Switzer came there——

Mr. Stim: I withdraw that.

Q. Did you know Mr. Faskow? A. The tenant, yes.

Q. He was the man who operated Berkeley Jewelers, Inc.? A. Yes. Yes.

Q. Between January, 1950, the day when they moved out, and May, 1950, did Mr. Faskow ever come up there? A. The day they moved out?

Q. From the day they moved out until May, the day when Mr. Switzer came. A. No. No, sir.

Q. Did any tenants come up to look at the fixtures or examine the premises? (774) A. No. One man came up and took the lighting fixtures out, a truck.

Q. That was before Mr. Switzer came there, or was it after? A. No, I believe it was after.

The Court: You are not sure?

The Witness: No, it was after.

The Court: You say it was after?

By Mr. Stim:

Q. And you are sure that Mr. Switzer was there alone? A. He was there alone, yes, sir.

Mr. Stim: That is all.

(Witness excused.)

* * * *

JOSEPH H. FEIER, called as a witness by the Government, being first duly sworn, testified as follows.

Direct examination by Mr. Schwartz:

Q What is your profession? A. I am a practicing attorney in the City of New (775) York.

Q. Are you a member of a firm, sir? A. Yes, sir.

Q. What is the name of your firm? A. Goldman & Frier.

Q. Where is their office? A. 7 Dey Street, New York City.

Q. How long have you been admitted to the bar? A. Since 1912.

Q. Did there come a time when your firm, the firm of Goldman & Frier, was appointed counsel to Harold A. Fagin, trustee in bankruptcy of Berkeley Jewelers, Inc.? A. Yes, sir.

Q. Was that during the month of February, 1950? A. I believe it was.

Q. Was that by order of the official referee of the United States District Court? A. Yes, sir.

Q. Would you tell the members of the jury what the duties and function of your firm were in the capacity as attorneys for the trustee in bankruptcy? A. Well, it is the duty of the attorneys to advise the trustee of what his duties are to marshal (776) the assets, to dispose of the assets, examine as to whether or not there was any complete accounting of all the assets and go into the situation very thoroughly to see that the estate is administered properly.

Q. Do you know a man named Morris H. Switzer? A. Yes, sir.

Q. Do you see Morris H. Switzer in this courtroom, sir? A. Yes, sir.

Q. Would you point him out, sir? A. He is sitting at the end table there, the second individual.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer?

The Court: Yes.

By Mr. Schwartz:

Q. Did you first meet Mr. Switzer in connection with the bankruptcy proceedings involving Berkeley Jewelers, Inc.? A. My best recollection is I did.

Q. In what capacity was Mr. Switzer acting at the time that you met him? A. I believe that he was co-counsel for the bankrupt.

(777)

Q. During the period between the date that you were appointed counsel for the trustee, February, 1950, and the month of May, 1950, had you had any conversations with Mr. Switzer? A. Yes, sir.

Q. Did you have any conversations with Mr. Switzer with respect to the vacated premises of Berkeley Jewelers, Inc. at 44 East 29th Street, New York City? A. Yes, sir.

Q. Would you tell the members of the jury what you said to Mr. Switzer about that and what Mr. Switzer said to you prior to the month of May, 1950? A. My best recollection is that the landlord wanted the premises vacated as quickly as possible. There were certain fixtures remaining in the premises, together with a safe, which the trustee refused to take possession of on the theory that they were heavily mortgaged and that there was no equity in it for the creditors, and they were not going to be responsible for rent because there was no merchandise, or nothing in the premises, all having been moved out before by the marshal's sale.

Q. Did you have any conversation with Mr. Switzer? A. Mr. Switzer told me that he wanted permission (778) to go into the premises.

Q. I am talking about the period prior to May, 1950. In that period did you have any conversation with Mr.

Switzer with respect specifically to the safe in Berkeley Jewelers, Inc., with respect to the conditon of the safe in the premises of Berkeley Jewelers, Inc.? A. My recollection is that he informed me that there was nothing in the safe or in the premises that was property of the trustee.

Q. Did there come a time in the month of May, 1950, when you received a telephone call from Mr. Switzer? A. I did, sir.

Q. Did you have a conversation with him at that time? A. Yes, sir.

Q. Would you tell us what he said to you and what you said to him? A. My best recollection is that he informed me that he had a prospective purchaser for the fixtures and the safe; would I give him permission to enter the premises.

Q. What did you say to him? (779) A. I told him that it was entirely up to the landlord, that we vacated the premises. We never took possession of the premises, and that I would gladly call up the landlord or the superintendent and ease his way so that he could dispose of the fixtures and help dispose of them in order to appease the landlord.

Q. Did you thereafter telephone the building superintendent? A. I did, sir.

Q. Did you instruct the building superintendent to allow Mr. Switzer to enter the premises? A. I said we have no objection to him going in there.

Q. Did there come a time a few days later when you had another conversation with Mr. Switzer? A. Yes, sir.

Q. Was that in person or over the telephone? A. It was over the telephone.

Q. Did you call him or did he call you? A. I called him.

Q. What did you say to him and what did he say to you? A. I told him that we had received information (780) that he had removed some merchandise from the premises; was that true.

He said he didn't take anything.

Q. Did that terminate that conversation? A. That is correct.

Q. What did you do after completing that conversation? A. I checked up the information, from where we got this story, and I called him up again.

Q. Was that on the same day? A. It was either the same day or maybe a few days later.

Q. Did you have a conversation with him at that time? A. I did, sir.

Q. What did you say to him and what did he say to you? A. I told him that I had made another check and I found out that he had taken three or four trays allegedly containing jewelry and put them under his coat and took them in the car.

Q. What did he say to that? A. He said he took them but they were of no consequential value and that he would write me a letter (781) explaining the whole situation.

Q. What did you say to him? A. I said that would be satisfactory "but you had no right to take anything. I would like to know why you took it."

Q. Was anything said about the return of the merchandise? A. He said he would return it with a letter of explanation.

Q. Was the merchandise returned to you or the trustee in bankruptcy within the following week? A. It wasn't.

Q. Was it returned to you or the trustee in bankruptcy within the following two weeks? A. My best recollection is no.

Q. Did you receive a letter from Mr. Switzer within the following week? A. No, sir.

Q. Did you receive a letter from Mr. Switzer in accordance with the telephone conversation? A. No, sir.

Q. Did there come a time when you learned——

The Court: At any time did you get the merchandise returned to you from Mr. Switzer?

(782)

The Witness: No, sir. After he was arrested the merchandise was turned over to the government authorities.

By Mr. Schwartz:

Q. Now there came a time when you learned that Mr. Switzer had been arrested? A. That is correct.

Q. Following the time that he was arrested, did you have a further conversation with Mr. Switzer? A. I did.

Q. Would you tell us what Mr. Switzer said to you and what you said to Mr. Switzer at that time? A. I asked him why he went up to the premises and he told me that, when the safe and fixtures were sold, the safe man opened the safe and found these four trays in there.

Q. What did you say to that? A. I said, well, he should have returned those to the trustee or notified me immediately.

Q. What did he say? A. My best recollection, he said nothing.

Q. At the time that you first received the request from Mr. Switzer to visit the premises of Berkeley Jewelers, did he say anything about the safe man finding merchan-

dise in the premises? (783) A. No, sir. It was only after he was arrested that he told me that.

Mr. Schwartz: No further questions.

Cross examination by Mr. Stim:

Q. That was some time in May, 1950, when he asked your permission to visit the premises? A. My recollection is that it was in the early part of May, 1950.

Q. Do you know when Mr. Switzer was arrested? A. The exact date, no.

Mr. Stim: Will the district attorney concede that Mr. Switzer was arrested during the month of May, 1950?

Mr. Schwartz: I will represent to the Court and to the jury and to Mr. Stim that, according to the Government's report, Mr. Switzer was arrested on May 31, 1950.

By Mr. Stim:

Q. Were you told, Mr. Frier, that prior to his arrest certain agents or an agent of the FBI came to Mr. Switzer's office and that at that time he was in the process——

The Court: Just a minute. I will ask the first question.

(784)

Were you ever informed, prior to the time that you heard about the arrest, that he had been visited by the agents?

The Witness: No.

Joseph H. Frier—for Government—Cross

Q. Were you ever informed by anyone that, prior to his arrest and while agents were in Mr. Switzer's office—of the FBI—they seized the letter which was at that time completed and addressed to you in connection with these contents of the trays of the safe? A. No, sir.

Mr. Stim: May I approach the bench?

The Court: Yes.

(Discussion at the bench off the record.)

Mr. Schwartz: May the record show that I am producing——

The Court: Mark it for identification.

(Marked Defendant's Exhibit KK for identification.)

By Mr. Stim:

Q. I show you Defendant's Exhibit KK for identification and ask you whether you ever saw these papers before? A. No, sir.

Q. Is that a letter addressed to your firm?

(785)

The Court: Just a minute.

Mr. Stim: He said, "No, sir."

The Court: The point is it is not evidence, and whatever it is you better not start reading it.

By Mr. Stim:

Q. Prior to today, did you have any conversation with the district attorney or anyone of the United States Attorney's office about this case? A. Yes, sir.

Joseph H. Frier—for Government—Cross

Q. Is this the first time you saw this letter, Defendant's Exhibit KK for identification? A. Yes, sir.

Q. Mr. Schwartz did not show it to you? A. No, sir.

Q. And neither did this gentleman here or anyone from the United States Attorney's office show you that letter? A. No, sir.

Q. And you gave him the same statement naturally that you told the jury here? A. I did, sir.

Q. And you told him that Mr. Switzer informed you that he is writing you a letter to give you a full explanation about what happened in connection with the (786) sale? A. Yes.

Q. And they did not tell you that a letter was seized by the Government in the office of Mr. Switzer and was not mailed to you by the Government? A. I never heard of that.

Mr. Stim: If your Honor please, I would like to offer this letter in evidence. It came from the Government's files.

Mr. Schwartz: There is no proper foundation for it at this time. However, I will state to Mr. Stim that it is my intention to offer that letter in evidence at the proper time through a government agent.

The Court: He represents that it will be offered at the proper time.

By Mr. Stim:

Q. Did the trustee in bankruptcy ever receive from the Government a tray of rings containing 106 rings and a tray of watches containing 8 watches, a small box——

Mr. Schwartz: I object to that, because he is obviously reading from a——

The Court: Overruled.

(787)

By Mr. Stim:

Q. Did you, as attorney for the trustee in bankruptcy, or anyone in your firm, or the trustee in bankruptcy, ever receive from the United States Government the following: One tray of rings containing 106 rings; one tray of watches containing 8 watches one small box of old rings and miscellaneous pieces of metal; three boards containing 29 baby rings, a number of keys, and some coins, amounting to $2.02? A. I will answer that yes and no.

Q. Will you please explain your answer? A. The Government seized that property and when they seized it they asked me to come down with the trustee and look at it. I visited this building here and I saw the trays and I saw the merchandise.

Q. But you were never given it? A. It was being held by the Government as evidence.

Q. Were you told that that merchandise was the merchandise which was in Mr. Switzer's office; that he was about to deliver it to the trustee in bankruptcy together with the letter, Defendant's Exhibit KK for identification? A. I was told that it was in Mr. Switzer's (788) office, but I was never told about any letter that was supposed to be delivered to me or sent to me.

Q. Were you told that Mr. Switzer delivered that merchandise to the Government representatives at their request at a time when they were in the office some time in

May of 1950? A. I was told that the Government seized that merchandise.

Q. You were not told the circumstances under which the merchandise came into the possession of the Government? A. I don't believe so.

Q. But you were never told about this letter?

The Court: Now that is the fifth time, Mr. Stim. None of us is going to live long enough to hear the end of this. I tell you we have intelligent people sitting on the jury and they don't have to have it drummed into their ears, an item like that. You made the point five or six times.

Q. Now, Mr. Frier, when you called Mr. Switzer's office the first time, when you said you had some information about some merchandise being taken out of the premises, did you speak to Mr. Switzer or to Mr. Shulman? (789) A. No, I spoke to Mr. Switzer.

Q. Did you ever examine the premises personally? A. My best recollection is I did. It is so long ago that I wouldn't be positive, but I am pretty sure I was there.

Q. But Mr. Switzer did speak to you about the merchandise which was taken out of the safe before he was arrested? A. Yes.

The Court: You mean, did he speak to him before he was arrested about the merchandise?

Mr. Stim: About the merchandise which was taken out of the safe.

A. Yes; he said it was of no consequential value and that he was writing me a letter and would return the merchandise.

The Court: Do you recall how long it was before May 31 that you had this conversation in which he agreed to return it?

The Witness: My best recollection is that I got no letter and I got no merchandise from him for a period of close to two or three weeks.

The Court: So that this conversation would have occurred some time about May 15 or maybe a week (790) earlier?

The Witness: I would say it was probably correct.

The Court: All right. We will take our recess.

(Short recess.)

By Mr. Stim:

Q. Now, Mr. Frier, you know the Bucknell Trading Company or you know of the Bucknell? A. I heard of them.

Q. Did you, as attorney for the trustee in bankruptcy, bring a proceeding in connection with certain merchandise turned over by the bankrupt to the Bucknell Trading Company for a preference, a preferential payment for a loan owed to that Bucknell Trading Company by the bankrupt? A. My recollection is that we did.

Q. Isn't it a fact that the proceeding was settled by the trustee in bankruptcy for $1,000? A. I would say that that is correct.

Q. In other words, the trustee in bankruptcy, after examining into the facts, accepted $1,000 in full settlement of its claim against Bucknell Trading Company? (791) A. I would say that the Court signed an order permitting the trustee to accept that offer of adjustment.

Q. Did the trustee in bankruptcy bring any proceeding

against Mr. Switzer to turn over any merchandise or money to the trustee in bankruptcy, if you know? A. My best recollection is no.

Q. And did you as attorney, or your firm, for the trustee give a release to Bucknell Trading Corporation at a time when the matter was settled, a general release? A. No.

Q. Did you abandon and release all claims for the trustee in bankruptcy against collateral merchandise and merchandise received by Bucknell Trading Corporation? A. No.

Q. Well, how did you settle the matter, then? A. Pursuant to the order of the court we were—the trustee was authorized, after a hearing before the Court, to accept the sum or $1000 and discontinue the proceedings that we instituted against him and release any claim against any of the further merchandise.

(792)

Q. The effect of that order was that the trustee released any claim it may have had against Bucknell Trading Corporation? A. I would say yes, arising out of the subject matter involved in that lawsuit.

Q. And that was——

The Court: What was the nature of the lawsuit?

The Witness: Bucknell claimed that they received certain collateral. Our contention was that the collateral they received was a preference; that—

The Court: You sued to recover back?

The Witness: That is correct.

The Court: Your defense was that you were suing on behalf of the trustee, claiming that they had received merchandise in preference over other

creditors of the bankrupt, and their defense was that it had come into their possession as collateral?

The Witness: Yes.

The Court: There came a time in the proceedings when Bucknell people offered to make a compromise settlement; in other words, they would no longer litigate your claim and they offered to pay (793) $1000 and that matter was submitted to one of the judges in the Bankruptcy Court and he said that would be agreeable?

The Witness: After notice to creditors.

The Court: Very well.

By Mr. Stim:

Q. And that money was paid to the trustee in bankruptcy? A. That is correct.

The Court: At the time that settlement was arranged, did you then know about this merchandise that subsequently was found in the possession of the defendant Switzer?

The Witness: If the date is given to me it would refresh my recollection. My opinion is that Bucknell's case may have been settled much later than this controversy arising out of these four trays.

The Court: When does the file show that this Bucknell matter was disposed of?

Mr. Sel wartz: I will look for that now.

The Court: Can you give us any enlightenment on it, sir?

Mr. Stim: It was much later. It was in (794) 1951 or 1952.

The Court: Very well. All right.

Joseph H. Frier—for Government—Cross

By Mr. Stim:

Q. Now, after the petition in bankruptcy was filed in February, I think, of 1950, and after you were designated, your firm, as attorneys for the bankrupt estate, did you have any conversation with Mr. Switzer about merchandise sold at a marshal's sale on or about January 28, 1950? A. Yes, sir.

Q. And as a result of that conversation, was there a stipulation entered into between the attorneys for the trustee, your firm, and the bankrupt estate, Mr. Switzer as attorney, concerning the disposition of that merchandise? A. There was, sir.

Q. I show you Defendant's Exhibit GG in evidence and I ask whether or not that is the stipulation which was entered into between you and Mr. Switzer as attorney for the bankrupt estate concerning the disposition of that merchandise sold at the marshal's sale? A. Defendant's Exhibit GG of April 11, 1956, is a record that was taken before the referee, John E. (795) Joyce, in which the trustee, and the attorney for the trustee, and Jack Fellerman entered into an arrangement wherein the merchandise alleged to have been sold on a judgment would be returned to the trustee on certain terms and conditions.

Q. Was Mr. Switzer as attorney for the bankrupt estate a party to that stipulation? Take a look and see if the record shows that. A. My best recollection is that Switzer was in the court but he wasn't a party to the stipulation as Fellerman was the one who had the merchandise.

Q. Let me see that, please.

Does the record, Defendant's Exhibit GG in evidence, indicate that among the parties appearing at that pro-

ceeding when the stipulation was entered was Mr. Morris H. Switzer as attorney for the bankrupt estate?

Mr. Schwartz: I object. The exhibit speaks for itself.

The Court: Overruled.

A. The record indicates all the people who were before the Court on that date.

Q. Is Morris H. Switzer one of them? A. Switzer represented the bankrupt. He was (796) one of them. Our firm was there, David Ray Bernstein, the attorney for Fellerman, was there, and Fellerman, the claimant, was there in person.

The Court: Bernstein was the attorney for Fellerman?

The Witness: I believe so.

The Court: Fellerman was the man you were making the arrangment with?

The Witness: That is correct.

The Court: According to that record, Switzer wasn't appearing for Fellerman?

The Witness: That is right.

Mr. Stim: No, he was appearing for the bankrupt.

By Mr. Stim:

Q. Was that on May 5, 1950? A. The record says so.

Q. And that merchandise was returned to the trustee in bankruptcy and sold by order of the Court? A. I believe that is correct.

Joseph H. Frier—for Government—Cross

Q. Isn't it a fact that it was Mr. Switzer with whom you had the conversations and the negotiation which resulted in the entry of the stipulation as evidenced by Defendant's Exhibit GG in evidence? (797) A. My best recollection is no.

Q. You did not negotiate or talk about it with Mr. Switzer? A. No, because at that time I did not have charge of this case. Mr. Jassy in my office had charge of it.

Q. You are saying that because you don't know? A. That is correct.

Q. Because you did not have charge of the case?

The Court: Just a minute, please. You keep summing up all the time, Mr. Stim. The witness has answered your question.

Are you going to pay attention to me when I am talking to you? You asked this witness did he discuss something and he said no and he explained why he said no. It adds nothing to it but to take our time.

Mr. Stim: Your Honor is right.

By Mr. Stim:

Q. Did you at any time talk to Mr. Switzer prior to that hearing in May, 1950, about the disposition of that merchandise? A. Yes, sir.

(798)

Re-direct examination by Mr. Schwartz:

Q. In the action brought by the trustee to recover alleged preferential transfers which you have referred to

on your cross examination, was the Buckneli Trading Corporation represented by counsel? A. My best recollection is yes, they interposed an answer.

Q. Do you recall who their attorney was? A. Offhand I do not.

Mr. Schwartz: No further questions.

(Witness excused.)

(Discussion at the bench off the record.)

* * * *

Moe Sturtz, called as a witness by the Government, being duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What is your business, Mr. Sturtz? A. Auctioneer and appraiser.

Q. Do you have an office for the transaction of that business? A. Yes, sir.

Q. Where is your office located? (799) A. 1133 Broadway.

Q. How long have you been in the auction and appraisal business? A. 40 years.

Q. In the course of that time have you become familiar with the valuation of various types of merchandise? A. Yes, sir.

Q. Have you become familiar with the values of jewelry? A. Yes.

Q. Have you become familiar with the forced sale of jewelry? A. Yes.

Q. And retail value? A. Yes, sir.

Q. And the wholesale value? A. Correct.

Q. Have you become familiar with those values with respect to appliances, electric appliances? A. Yes.

Q. Now in the course of your 40 years' experience as an auctioneer and appraiser, have there been any occasions when you have been appointed by the Court, (800) the United States District Court for the Southern District of New York to appraise——

Mr. Stim: Your Honor, I will concede the qualifications of him as an expert.

Q. —to appraise the bankrupt estate's value? A. Yes, sir.

Q. On how many occasions? A. Over 40 years.

Q. Yes. A. Over 500.

Q. On approximately how many occasions have you been appointed by the Court to appraise stocks or jewelry and appliances? A. At least 100.

Q. Did there come a time when you were appointed by Referee Joyce of this court as the official appraiser for the bankrupt estate of the Berkeley Jewelers, Inc.? A. Yes, sir.

Q. Was that during the month of May, 1950? A. Correct.

Q. Now what assets were you ordered to appraise? A. Well, there was 174 cases of goods in the warehouse at that time that I appraised.

(801)

Q. What warehouse was that? A. Piken's on Hubert Street.

Q. Piken's Warehouse on Hubert Street in New York City? A. Yes, that is correct.

Q. Was any merchandise that you were ordered to

appraise located anywhere else? A. Yes. In the showroom up on Broadway. I think it was 1125, if I am not mistaken.

Q. Is that the showrom of the Berkeley Pennsylvania Corporation? A. That's right.

Q. What kind of merchandise was located at the showroom of the Berkeley Pennsylvania Corporation? A. Well, there were watches, chains, bracelets, leather goods and appliances, I believe, some electrical appliances or one thing or another.

Q. Was the bulk of this merchandise located at the premises of the Berkeley Pennsylvania Corporation or at the premises of Piken's Warehouse? A. Most of it was all at the warehouse. There was 174 cases there.

Q. Would you describe the merchandise that there was in these 174 cases at Piken's Warehouse? (802) A. Well, there were chains and watches, children's jewelry, leather goods, electrical appliances, a variety of stuff.

Q. Did you thereafter proceed to make an appraisal of this merchandise? A. I did.

Q. And how long were you occupied in making this appraisal? A. Between the warehouse and up on Broadway I was 10 days.

Q. Was your appraisal filed on June 30, 1950? A. Yes, sir.

Q. Mr. Sturtz, I show you Government's Exhibit 1G in evidence and I ask you what that is? A. That is the order and this is the appraisal of the goods all in the warehouse.

Q. Does this exhibit comprise your itemized schedules submitted to the Court. A. It does.

Q. Would you tell the jury what your valuation of the merchandise that you appraised was? A. $18,766.50.

Q. Now was that valuation based on the retail value, the wholesale value or the forced sale value? (803) A. That was a forced sale value.

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(804)

THOMAS M. FARLEY, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What position do you hold, Mr. Farley? A. I am employed as the chief deputy United States marshal for the Southern District of New York.

Q. Is it part of your duties to maintain custody of documents turned over to the United States marshal by other law enforcement agencies? A. Yes, sir.

Q. I should say documents and exhibits.

Mr. Schwartz: May I have this marked for identification, please?

(Marked Government's Exhibit 19 for identification.)

Q. Mr. Farley, I show you Government's Exhibit 19 for identification and ask you, do you know what that is? A. This is a package that was delivered to us by the FBI to be held as evidence which we received on February 8, 1954.

Q. Do you know where that package has been between February 8, 1954 and this day? (805) A. That was placed in a vault in the marshal's office.

Thomas M. Farley—for Government—Direct

Mr. Schwartz: No further questions.
Mr. Stim: No questions.
(Witness excused.)

Mr. Schwartz: The Government calls Carl Bennett.

Carl L. Bennett, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. Mr. Bennett, what position do you hold? A. Special agent, FBI.

Q. How long have you been a special agent of the FBI? A. A little over 15 years

Q. Were you engaged in the performance of your official duties on May 31, 1950? A. I was.

Q. Do you know a man named Morris Switzer? A. I do.

Q. Do you see Mr. Switzer in this courtroom? A. I do.

Q. Will you point him out, sir? (806) A. He is the man sitting at the middle of the back table there.

Mr. Schwartz: May the record show the identification of the defendant Morris H. Switzer?
The Court: Yes.

By Mr. Schwartz:

Q. Did you have a conversation with Mr. Switzer on May 31, 1950? A. I did.

Q. Would you tell us how that came about? A. Well—

The Court: What is the date?

Mr. Schwartz: May 31, 1950.

A. I had a warrant for Mr. Switzer's arrest and I went to an office building on Sixth Avenue in the lower 30s. and to Mr. Switzer's office, to execute the warrant. At that time I told him that he was under arrest, charged with concealing some assets from the Berkeley Jewelry premises.

Q. What did he say to you, sir? A. At that time he said he had not concealed any assets. He told me he did have some jewelry that he had taken which he had itemized and notified the trustee, the attorney for the trustee, that he had (807) in his possession.

He produced—shall I continue?

Q. Yes. A. He produced a letter addressed to Mr. Joseph Frier, I believe, advising Mr. Frier that he had this jewelry in his possession.

Q. I show you Defendant's Exhibit KK for identification and ask you whether you recognize that, sir? A. That is correct. This is the letter he had in his possession.

The Court: It is? That is the letter he showed you?

The Witness: Which he gave me, yes.

Mr. Schwartz: I offer it in evidence.

Mr. Stim: No objection.

(Government's Exhibit 20 received in evidence.)

The Court: Is it in the same condition now as at the time he gave it to you?

The Witness: It is.

(Mr. Schwartz reads Government's Exhibit 20 to jury.)

By Mr. Schwartz:

Q. Did Mr. Switzer turn anything over to you besides the letter? (808) A. Yes, he gave me two trays, I believe it was, of jewelry that he had in his possession. He took them from a metal closet in the corner of the office room.

Q. I show you Government's Exhibit 19 for identification and ask you if you recognize that in its present condition? A. Well, it has been some time since I seen the package but I believe this was——

The Court: Well, after you had gotten the trays, did you bring them down to your office here?

The Witness: I brought them to the office and inventoried them.

The Court: After that did you do anything with them?

The Witness: Yes, I sealed them up, wrapped them in brown paper.

The Court: What did you do with the package?

The Witness: It was turned over to the United States marshal.

The Court: Now, does that exhibit which you have before you appear to be the package that was made up of these trays which you got?

(809)

The Witness: It's the type of package that I normally make up. I make a lot of them up.

Mr. Schwartz: I offer it in evidence at this point.

The Court: Do you have to offer the package in that form? Why don't you mark it for identification?

Mr. Schwartz: May the record now show that I am opening Government's Exhibit 19 for identification, consisting of a carton wrapped in brown paper.

May the record show that I am now showing the witness one of the inner wrappings which are contained in the exhibit which I have just removed from a metal tray.

By Mr. Schwartz:

Q. I show you this wrapping Mr. Bennett. Does that refresh your recollection? A. That is my signature and the date on which I wrapped this evidence.

Q. Is this metal box part of that? A. Yes.

Q. I show you the wrappings on another one of these inner packages and ask you whether you recognize that? A. That is my name across the seal and the date (810) of the wrapping, May 31, 1950.

Q. Are the contents of this package part of the merchandise that was turned over to you by Mr. Switzer on May 31, 1950 at 855 Sixth Avenue in New York? A. That is correct.

Q. I show you the third and last inner package and ask you whether you recognize that? A. That is my signature and date on the seal of the package. That was a package that I obtained from Mr. Switzer.

Q. On May 3, 1950? A. That is correct.

Mr. Schwartz: May the record show that I have completed removing the wrappings from Govern

ment's Exhibit 19 for identification and that I have shown the contents to the witness.

By Mr. Schwartz:

Q. Mr. Bennett, will you look at those packages. A. Yes, this is the package of rings, birthstones, tray of birthstones, rather, which Mr. Switzer gave to me.

Q. Is that tray of rings one that you received from Mr. Switzer on May 31? A. Yes, sir. And this is another tray of eight (811) watches that I received from Mr. Switzer on May 31, 1950.

Mr. Schwartz: I offer the contents of Government's Exhibit 19 for identification in evidence.

Mr. Stim: No objection.

The Court: I think it would be helpful if you take each tray and mark it separately. Take the tray of watches and mark it 19A.

(Trays of jewelry marked Government's Exhibits 19A through 19C for identification.)

Mr. Schwartz: I offer in evidence Government's Exhibit 19A for identification.

Mr. Stim: No objection.

The Court: You are offering 19A, B and C for identification?

Mr. Schwartz: Yes.

(Government's Exhibits 19A through 19C for identification received in evidence.)

Mr. Schwartz: May I show these exhibits to the jury?

The Court: I suggest you wait until after lunch. We will adjourn now until 2:15.

(Recess taken until 2:15 p. m.)

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(812)

AFTERNOON SESSION

(2:15 p. m.)

CARL L. BENNETT, resumed.

Mr. Schwartz: May I show Government's Exhibits 19A, B and C to the jury, your Honor?

The Court: Yes.

Mr. Schwartz: May I at this time correct the record that the tray of rings which was Government's Exhibit 19B in evidence contains 108 rings instead of the number that we previously stated.

The Court: You said 103 before. Now you say it is 108?

Mr. Schwartz: Yes, your Honor.

(Government's Exhibits 19A, B and C shown to jury.)

Direct examination continued by Mr. Schwartz:

Q. Mr. Bennett, I show you Government's Exhibit 20 in evidence and I call your attention to the statement on that exhibit. In the box there are also a number of keys and some coins amounting to $2.02. Were there coins amounting to $2.02? A. Not to my recollection, there wasn't.

Q. Mr. Bennett, was there a time when you were assigned to investigate the circumstances of the (813) bankruptcy at Berkeley Jewelers, Inc.? A. Yes, sir.

Q. When was that, sir? A. Around the early part of May of 1950.

Q. And subsequent to that date did you contact certain potential witnesses in connection with that investigation? A. I contacted them, yes.

Q. What particular witnesses? A. Well, I contacted Mr. Faskow.

Q. Did you ask Mr. Faskow for a statement? A. Mr. Fas' w refused to talk to me about the matter. He stated he was represented by Mr. ——

Mr. Stim: I object to any statement that Mr. Faskow gave after the arrest of this defendant.

The Court: When was this that you had this conversation with Faskow?

The Witness: This was about June or July of 1950.

The Court: Let me see the indictment.

(Handed to Court.)

The Court: Sustained.

By Mr. Schwartz:

Q. Did there come a time during the course of (814) your investigation when you had a conversation with Morris Switzer? A. Yes, sir.

Q. When was that, sir? A. Well, the first time my conversation was at the time I arrested Mr. Switzer in May; May 31, 1950.

Q. Did you have any telephone or personal conversa-

tion with Mr. Switzer prior to that date? A. I don't believe it was prior to that date.

Q. Would you state your conversation with Mr. Switzer at the time he was arrested?

Mr. Stim: We already had that.

The Court: I don't know.

By the Court:

Q. In your testimony up to now have you told us all that was said by Mr. Switzer at the time you arrested him? A. I think I related the situation in his office. We had some conversation on the way to the court house.

Q. That you have not told us about? A. That is correct.

Q. You may tell us. A. On the way to the court house in the automo- (315) bile Mr. Switzer made several statements to me that I was——

Q. Tell us in substance what he said. A. He said that this was a false arrest.

Mr. Stim: What?

A. "This is a false arrest." He was going to cause me a lot of trouble; that he was going to prefer charges against me for making a false arrest, and that the FBI thought they were just a bunch of tin gods, and general remarks like that; that I would really be put on the spot because of my arresting him.

Q. Did you have any conversation with Mr. Switzer after that day? A. Well, I have not fully completed it.

Just before we arrived at the United States Court House Mr. Switzer told me, if I would let him go, that he wouldn't prefer any charges against me.

I told him that I couldn't let him go; that I had a warrant for his arrest, I had to execute it and complete it, and that was about where the conversation ended prior to the arrival at the court house.

By Mr. Schwartz:

Q. Did you have any conversation with Mr. Switzer subsequent to that date? (816) A. Yes, I had occasion to call Mr. Switzer because Mr. Faskow told me——

Mr. Stine: I object.
The Court: Just a moment.
You did have a conversation?
The Witness: Yes.

By Mr. Schwartz:

Q. When was that, approximately? A. That would have been around June or July; probably about the middle of July.

Q. Of what year? A. 1950.

Q. Would you tell us what you said to Mr. Switzer and what Mr. Switzer said to you at that time? A. I told him that I wanted to talk to Mr. Faskow and Mr. Faskow had referred me to Mr. Switzer, inasmuch as he was his counsel, and Mr. Switzer told me that he would not permit Mr. Faskow to be interviewed by me.

I also asked him if he represented Mr. Fellerman and Mr. Mintz, inasmuch as they had been in bankruptcy hearings with Mr. Switzer which I had attended, and he said he also represented them.

And I asked him about other witnesses whom I wanted to talk to: Mr. Ackerman and Mr. Shear, and——

(817)

By the Court:

Q. Who were the others? A. Mr. Ackerman and Mr. Irving Shear.

Q. And who else? A. Mr. Fellerman, Jack Fellerman, Mr. Sam Mintz and Mr. Faskow and his daughter, Renee Faskow.

And he told me that he represented all of these individuals and that he had advised them not to talk to me.

By Mr. Schwartz:

Q. Have you completed the list of people that he said he represented, sir? A. Well, just about everybody that I knew had any knowledge of the case. I don't recall anybody in addition.

The Court: Is your recollection completely exhausted now?

The Witness: It is

Q. Did you ever hear the name of Jack Shulman? A. That's right. Jack Shulman is another individual he said he represented.

Mr. Schwartz: No further questions.

(818)

Cross examination by Mr. Stam:

Q. Mr. Bennett, did you notify or call Mr. Switzer for an appointment, prior to your coming down to his place, in the office on May 31, 1950? A. No, sir, I did not.

Q. He did not know you were coming as far as you know? A. That is correct.

Q. No other agent of the FBI saw him before that as far as you know? A. As far as I know.

Q. When you came down to his office on May 31 you began first to talk to him about Berkeley Jewelry before you told him you had a warrant for his arrest? A. No, sir, I did not. I told him I had a warrant for his arrest.

Q. So you told him about it? A. That's right.

Q. At that time this letter, Government's Exhibit 20 in evidence, was on his desk all completed, isn't that so? A. I believe he withdrew it from his coat pocket.

Q. Sir? A. I believe he withdrew it from inside his coat (819) pocket.

Q. But typed and ready as it is here? A. It was typed and in the envelope, yes, sir.

Q. Then you asked to look at the letter, or did he show you the letter himself? A. No, he showed it to me.

Q. He showed it to you voluntarily? A. That is correct.

Q. And he also discussed with you and told you about these trays, the exhibits which are mentioned in this letter? A. I told him I had information that he had taken some jewelry from the premises.

Q. He told you— A. He brought this from his metal closet from the corner of the room.

Q. It wasn't on his desk? A. No. That's right.

Q. But it was mentioned in this letter? A. That's right.

Q. And he delivered it to you voluntarily? A. That's correct.

Q. And he at that time told you that he was in-
(820) nocent of any concealment, of any charge against

him in connection with the bankruptcy? A. He told me that, yes, sir.

Q. On the way to the commissioner's office with you he protested innocence quite vehemently, didn't he? A. Well, when you say his innocence, he didn't discuss any particular concealment. This is the only thing we discussed.

Q. But that is all you talked about? A. Yes.

Q. He denied that he concealed any of this stuff from the bankrupt estate? A. He told me he had advised the attorney for the trustee that he had it.

Q. And his letter so indicated? A. That is right.

Q. Now, on his way to the office here he was quite vehement and quite outraged about his being arrested? A. He was, sir. He didn't want to go down with me.

Q. Sir? A. He didn't want to go down with me.

(821)

Q. He did— A. After communicating with his attorney, Mr. Palmer, on the telephone, Mr. Palmer told him he should accompany me to the office.

Q. And he did accompany you? A. Yes, he did.

Q. Now, you say you had other conversations with Mr. Switzer subsequent to May 31, 1950? A. I had one on the telephone, yes, sir.

Q. You mentioned certain names to him and he said he represented these people? A. That's right.

Q. Were you present in the Bankruptcy Court or in the referee's place when the examinations were held? A. A few I was there part of the time; not all of them.

Q. Were you present when Shulman was examined? A. I may have been. I believe I was on one occasion.

Q. Was he represented by counsel other than Mr. Switzer, as far as you know, if you know? A. That I don't recall. I don't know.

Q. Were you present when Mr. Fellerman or Mr. (822) Mintz were examined in the bankruptcy proceeding before the referee? A. I probably was on one occasion.

Q. Did you know or did you see any counsel other than Mr. Switzer representing them? A. I don't recall that I did.

Q. You don't recall if you did? A. That I saw then there. I know subsequently we talked to an attorney whose name I don't now recall.

Q. Is his name Bernstein? A. That is correct.

Q. He represented Mr. Fellerman? A. That is after we talked to Mr. Fellerman and Mr. Fellerman did give us his information concerning the case, and then he decided later that he better have an attorney and he called Mr. Bernstein to represent him.

Q. Now prior to that and as far as you knew, he represented the people that you talked about? A. He told me.

Q. He told you so? A. That's right.

Q. And he knew, of course, that you were an (823) agent of the FBI? A. I identified myself when I arrested him.

Q. Are you an attorney? A. No, sir, I am an accountant.

Q. You know, in your connection with your experience in your service as an agent for the FBI, that an attorney in a criminal proceeding has a right to advise his client not to talk to government agents in connection with an investigation of any crime in which they may be involved? A. That is so.

The Court: Stop the arguing. Argue that to the jury at the appropriate time.

By Mr. Stim:

Q. After you saw and obtained Government's Exhibit 20 in evidence, where the names of the attorneys for the trustee were given, did you call Mr. Frier or anyone in that office to verify the contents of that letter? A. I contacted Mr. Frier. He had not received that letter or a copy thereof.

Q. Well, naturally he couldn't receive the letter because you had it, but did you tell him that you seized a letter addressed to him? (824) A. I told him I had seen that letter.

Q. Did you read the contents of that letter to him? A. I believe Mr. Frier saw the contents or I told him of the substance of the letter, anyway.

Q. In any event, you told him subsequently about the contents of that letter. Did you ever show him the letter itself? A. I don't know whether I showed him the letter. As I say, I told him the contents of the letter. I told him about it.

Q. You told him it was a letter ready to be mailed to him; is that so? A. Yes, sir.

Q. And you read it to him? A. That is right.

Mr. Stim: No further questions.

Mr. Schwartz: No further questions.

(825)

MOE STURTZ, resumed.

Direct examination continued by Mr. Schwartz:

Q. Mr. Sturtz, I show you Government's Exhibits 19A, 19B and 19C in evidence and ask you to examine those. Have you completed your examination, sir? A. I have.

Q. Based on your experience in the appraisal of stocks of jewelry, can you give the members of this jury your opinion as to the forced sale value of the merchandise comprised in these three exhibits that you have just examined during the month of May, 1950?

Mr. Stim: I object to that on the grounds it is incompetent, irrelevant and immaterial in so far as this indictment is concerned.

The Court: I will hear you on that.

Mr. Stim: Your Honor, we are not charged with values, concealing of values, concealing of merchandise, and unless the Government can show that the merchandise represented by these exhibits or by the contents of the exhibits is different from the merchandise that was actually in the safe, I don't believe that the Government can show any evidence or offer any proof on the value of the merchandise.

(826)

The Court: Overruled.

Mr. Stim: Exception.

By Mr. Schwartz:

Q. Can you give us your opinion as to the forced sale value of this merchandise during the month of May in the

year 1950? A. I believe I appraised it for $250 at that time.

Mr. Schwartz: No further questions.

* * * *

(845)

HAROLD A. FAGIN, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Schwartz:

Q. What business are you in? A. Watches, importing of watches.

Q. What is the name of your company? A. Longines-Wittnauer Watch Company.

Q. How long have you been with the Longines-Wittnauer Watch Company? A. Ten years.

Q. Do you hold any office in that concern? A. I do.

Q. What office do you hold? A. Vice president.

Q. What office did you hold in the Longines-Wittnauer Watch Company during 1950? A. Credit manager.

Q. Was the Longines-Wittnauer Watch Company in 1950 a creditor of Berkeley Jewelers, Inc.? A. They were.

Q. Did there come a time when you learned that Berkeley Jewelers, Inc. had been adjudicated a bankrupt? (846) A. That is right.

Q. Was that early in the year 1950? A. Correct.

Q. And did there come a time when you were elected the trustee in bankruptcy for the bankrupt estate, Berkeley Jewelers, Inc.? A. That is right.

Q. Was that on April 6, 1950? A. I believe that is correct.

Q. Have you been acting since that time in your capacity as trustee in bankruptcy of Berkeley Jewelers, Inc.? A. I have.

Q. I show you Government's Exhibit 1G in evidence and ask you to look at that, and I show you Government's Exhibit 1F in evidence.

Mr. Stim: There is no answer to the first one.
Mr. Schwartz: It didn't require an answer.

Q. I show you Government's Exhibit 1F in evidence and call your attention to Schedule B, consisting of Schedule B-1, B-2 and so forth in that schedule.

I ask you, Mr. Fagin, whether the assets of Berkeley Jewelers, Inc. which are listed in those (847) schedules comprise all of the assets of the bankrupt estate that have been turned over to you or have come to your attention from the date that you qualified as trustee in bankruptcy up until this day? A. I believe that is correct.

Mr. Schwartz: No further questions.

• • • •

(869) • • •

The Court: Any further motions? I take it there are none.

All right, gentlemen, we will adjourn until 10:30 Monday morning.

You will be ready to go ahead?

Mr. Stim: Yes, your Honor.

May I by Tuesday morning submit to your Honor requests to charge?

Stipulation

The Court: How long do you think your case will take?

(870)

Mr. Stim: It seems to me that I ought to be finished—the defendant will take the stand, and I have one or two more witnesses at most. I know I have one witness at least. I assume probably the defendant will be on the stand all day.

The Court: All right; Tuesday morning. Have them in before noon on Tuesday.

Mr. Stim: I will, your Honor.

The Court: Have your requests by the time we open court on Tuesday.

Mr. Stim: I will have it over the weekend, your Honor.

The Court: But you will have them in by 10:30 on Tuesday.

Mr. Stim: Yes.

* * * *

(1282) * * *

Mr. Stim: Subject to the stipulation that we discussed with your Honor at the bench, the defendant rests.

The Court: Now, I wish you would enter on the record any stipulations you desire to enter into.

Mr. Schwartz: In lieu of rebuttal the Assistant United States Attorney has stipulated with Mr. Stim, the attorney for the defendant, (1283) as to the following, first, if the grand jury stenographer were called as a witness he would testify that he is a qualified shorthand reporter and that on April 30, 1952, and again on May 5, 1952, he transcribed the testimony of Morris H. Switzer given before a grand jury regularly empaneled and sitting as such in the Southern District of New York using a shorthand method of transcription, that subsequently the shorthand

reporter transcribed his notes on the typewriter and further that the excerpts from the grand jury testimony which have been read by myself during the course of this trial are to the best of that witness' ability a true and accurate transcription of the actual testimony given by Morris H. Switzer before the grand jury in April and May, 1952.

Mr. Stim: I will so stipulate, your Honor.

The Court: Very well.

Mr. Schwartz: Secondly, that Government's Exhibit 28 for identification, a statement of Morris Switzer made before an Assistant United States Attorney, Frederick H. Block, on May 31, 1950, that (1284) if the stenographer who took that statement were called the stenographer would testify as to her competency as a shorthand reporter, that she was present and took down in shorthand the questions asked by the United States Attorney and the answers made by the defendant Switzer and she has compared her notes with the statement that was used here and marked for identification and the statement as it appears transcribed is a correct transcription of the stenographic notes which were taken on that day.

Mr. Stim: I so stipulate.

* * * *

(1287) * * *

(The following took place in the robing room:)

The Court: As to the defendant's requests to charge, I refuse to charge Nos. 1, 2 and 3 in the form in which they appear here in your requests, but the matters that they refer to are going to be covered in my charge. They relate chiefly to the (1288) nature of the charge, what the elements of the offenses are under each count and the conspiracy.

Now, No. 4 is refused and you may have an exception. You have an exception, if you desire to take it, to my refusal to charge in the manner in which you have stated the requests in Nos. 1, 2 and 3.

No. 5: The substance of that will be covered.

The same as to Nos. 6 and 7. No, I am leaving out No. 7 for the moment because I want to talk to you about it.

No. 8 I will cover.

No. 9 I will cover.

No. 10 I refuse to charge in that form on the question of interest. I will cover it, of course, but that is in another request of yours.

No. 11 will be covered.

No. 12 is refused in that form.

No. 13 is refused in the form in which you state it, but the subject matter of 12 and 13 will be covered.

No. 14 is refused.

No. 15 is refused in that form. I will (1289) instruct the jury as to that.

No. 16 I will cover in different language, a little more fully than you have it.

No. 17 is refused in that form, but it will be covered. That is the burden of proof.

No. 18 will be covered.

No. 19 is granted. It may not be charged in precisely that form, but it will be covered.

No. 20 will be covered in somewhat different language.

No. 21 will be covered.

Nos. 22 and 23 I refuse to charge in that form, but I will instruct the jury on what it is they are to take into consideration.

Mr. Stim: May I respectfully except to your Honor's refusal.

Proceedings in the Robing Room

Now we have No. 7.

The Court: Yes, No. 7 as stated here relates to the question of interest charged. Now, I don't know whether it is wise for you to want to go into that. The jury is going to be instructed that the only two offenses that this man is indicted for are, one, transferring these assets under Count 2, and in the conspiracy under Count 3.

(1290)

If you go into this question of interest you may just call to their mind something that might annoy them and they might have forgotten.

Mr. Stim: I am sure that the District Attorney will go into it.

The Court: I don't think this question of interest ought to be gone into at all. This man is not on trial here for that.

Mr. Stim: So much was said about interest.

The Court: All right, if you want me to go into that.

Mr. Stim: I would like you to go into it.

The Court: All right, I will cover it.

Mr. Stim: Very well, your Honor.

Now I would like to renew my motions at the end of the entire case.

The Court: You may. I am not quite finished yet. I want to go over the District Attorney's requests.

No. 1 is all right. That will be covered.

No. 2 I am not going to charge.

No. 3 I am not going to charge.

(1291)

No. 4 is going to be covered.

No. 5 will be covered.

Proceedings in the Robing Room

Government's Requests to Charge

No. 3 and No. 7—I will cover No. 7.

Mr. Schwartz: Have you touched on No. 6?

The Court: Yes, I am going to cover No. 6 in different form.

No. 9 I will cover.

10, 11, 12, 13, 14. 15 I not going to mention.

16 will be covered.

Mr. Stim: You said 15 will not be mentioned?

The Court: That is right. 16 I have to.

No. 17 I am not going to charge.

No. 8 will be covered.

* * * *

(1366)

(Government's requests to charge are as follows:)

1. In order to find the defendant guilty of conspiracy to transfer the assets of Berkeley Jewelers, Inc. in contemplation of bankruptcy and with intent to defeat the bankruptcy laws, it is not necessary that you find that the assets of that corporation were actually transferred to the Berkeley Pennsylvania Corporation. It is sufficient if you find that this defendant conspired with others to effect that object and that one or more of the conspirators performed an overt act in furtherance thereof.

2. Persons other than officers of agents of a corporation may conspire with an officer of said corporation to transfer its property in contemplation of bankruptcy and with intent to evade the bankruptcy laws.

3. Whether the bankruptcy was voluntary or involuntary is immaterial in a prosecution for conspiracy to transfer assets in contemplation of bankruptcy.

Government's Requests to Charge

(1367)

4. For two or more persons to conspire, confederate or combine together to commit or cause to be committed a breach of the criminal law of the United States is an offense of grave character which involves not only a plotting to subvert the law but also the preparation of the conspirators for further criminal practices. It is almost always characterized by secrecy, rendering detection difficult and requiring much time for its discovery. Because of this the statute has made a conspiracy to commit a crime a distinct offense from the crime itself.

5. Such an offense is rarely provable by direct testimony. The evidence and proof of the conspiracy may be, and from the nature of the case generally must be, circumstantial. All considered action to violate the law or to commit a fraud is secret and is ordinarily shown by separate, independent acts tending to exhibit a common desire.

6. "Circumstantial evidence is that evidence which tends to prove a disputed fact by the proof of other facts which have a legitimate tendency to lead the mind to a conclusion that (1368) the fact exists which is sought to be established. This is legal evidence, and a jury must act upon it as if it were direct, when it is satisfactory beyond a reasonable doubt."

7. A witness is said to be corroborated when his testimony, either in whole or in part, is supported either by the testimony of another witness in substantial agreement with him or by other circumstances pointing to the truth of his testimony.

8. When men enter into an agreement or conspiracy to accomplish an unlawful end, they become agents for one another and the act of one in pursuance of the common purpose is deemed to be the act of all and to make all responsible for that act.

9. One defendant need have no knowledge of the overt acts of the other conspirators. If he is in the conspiracy and has knowledge of the scheme, he adopts and sanctions the acts of the other conspirators as his own.

10. However, while the overt act, done to effect the object of the conspiracy, is essential to render a conspiracy punishable, yet such act (1369) need not be a criminal act, much less an act constituting the crime that is the object of the conspiracy. That is, the overt acts in execution or furtherance of the conspiracy may be innocent or criminal.

11. All overt acts charged in the indictment need not be proved to sustain a conviction. If any one be proved beyond a reasonable doubt it is sufficient to make out the offense.

12. "You are instructed that interest creates a motive for false testimony: that the greater the interest the stronger is the temptation and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony. • • • The peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility and (is) to be carefully considered by them (the jury)."

Government's Requests to Charge

13. "It is not necessary for the Government to prove the guilt of the defendants or any of them beyond a possible doubt. If that were the (1370) rule, few men, however, guilty they might be, would be convicted. The reason would be that in this world of ours it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty. In consequence, the law is such that in a criminal case, it is enough if proved that the defendant's guilt be established beyond a reasonable doubt—not beyond all possible doubt."

14. A reasonable doubt does not mean a fanciful doubt; nor does it mean a capricious doubt. It does not mean a doubt born of a reluctance upon the part of a jury to perform an unpleasant task. Nor does it mean a doubt occurring out of sympathy or sorrow for the defendants or anyone connected with them; but it does mean a doubt which is reasonable in view of all the evidence in the case.

15. You are instructed that the question of possible punishment of the defendant in the event of conviction is no concern of the jury, and should not in any sense enter into or influence (1371) your deliberations. The duty of imposing sentence rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of such evidence. Under your oaths as jurors, you cannot allow a consideration of the punishment which may be inflicted upon the defendant, if he is convicted, to influence your verdict in any way.

16. While the accused at the beginning of the trial is presumed to be innocent, yet, whenever the proof shows his guilt, beyond a reasonable doubt, then the presumption of innocence disappears from the case.

Government's Requests to Charge

Defendant Switzer's Requests to Charge

17. No demand is necessary by the trustee in bankruptcy of those in possession of the bankrupt's property. It is the duty of the person in possession of such property or proceeds thereof to turn it over to the trustee without demand.

(1372)

(Defendant Switzer's requests to charge are as follows:)

1. To convict the defendant Switzer of the Third Count of the indictment which charges him with the crime of conspiracy to violate the bankruptcy laws, there must be a finding by the jury that the defendant Switzer entered into an agreement with others to violate the law. Mere knowledge by the other defendants of a plan to violate the law by Switzer without their agreeing to join in the plan is not sufficient. Mere knowledge by the other defendants that the law was being violated, without their joining in an agreement to violate the law, is not sufficient to spell out the crime of conspiracy charged in the Third Count of this indictment. Mere aid or assistance given by the defendant Switzer to the other defendants to violate the bankruptcy law is not sufficient to convict him of the crime of conspiracy, unless such aid was given by the defendant Switzer for the purpose of carrying out the unlawful design of the conspiracy agreed to by the other defend- (1373) ants and Switzer.

2. The first inquiry by the jury should be, was there an unlawful agreement entered by the defendants, Albert Faskow, Jack Shulman, Irving Shear, Sam Mintz and Jack Fellerman, with the defendant Switzer in contemplation of a bankruptcy proceeding against Berkeley Jewelers, Inc., and with intent to defeat the bankruptcy law,

to 1) cause Berkeley Jewelers, Inc., to confess to four $1,000.00 judgments in favor of Jack Fellerman, an unsecured creditor of said corporation, and thereby enable the aforesaid Jack Fellerman to become a judgment creditor of Berkeley Jewelers, Inc.: 2) cause execution to be had on the aforesaid judgments and that the assets of the judgment debtor, Berkeley Jewelers, Inc., would be levied upon at a City Marshal's Sale, and that a receipt for the sale of said assets would be made out to Irving Shear, a nominee of the defendants herein; 3) to organize a new corporation known as Berkeley Pennsylvania Corporation and that thereafter, in contemplation of a bankruptcy proceeding against Berkeley Jewelers, Inc., and with intent to defeat the (1374) bankruptcy law, the assets of the Berkeley Jewelers, Inc. would be transferred to Berkeley Pennsylvania Corporation?

If the above stated acts were not made in contemplation of a bankruptcy proceeding against Berkeley Jewelers, Inc., but were made solely to enable Jack Fellerman, an unsecured creditor to obtain judgments against Berkeley Jewelers, Inc. and levy on the merchandise of the corporation, and if you find that the organization of Berkeley Pennsylvania Corporation was not made in contemplation of bankruptcy but was made to separate the "lay away" business of Berkeley Jewelers, Inc. from the other business, and if you find that no assets of Berkeley Jewelers, Inc. were in fact transferred to Berkeley Pennsylvania Corporation, then I charge you as a matter of law, that the crime of conspiracy as charged in the Third Count of the indictment has not been established, and you must acquit the defendant Switzer of that charge.

3. The defendant Switzer cannot be convicted of the the crime of conspiracy unless it is (1375) proven that

the acts charged were committed by him with knowledge of the conspiracy, and that the things done by the defendants and alleged co-conspirators were in furtherance of and in execution of a general plan of conspiracy. If the defendant Switzer did the things charged in the Third Count of the Indictment merely in violation of the law and not in furtherance and in execution of a general plan of conspiracy, he cannot be convicted of the conspiracy charged in the indictment

4. The presence of a number of circumstances which would lead to the suspicion that the defendant Switzer committed or aided others in the commission of the substantive offenses referred to in the Third Count of the indictment, does not warrant a conviction for the crime of conspiracy, unless these substantive offenses were committed in execution and furtherance of a plan and agreement charged in the Third Count of the indictment.

5. The proof shows that the defendant Switzer met and knew the other defendants and persons named in the Third Count of the indictment (1376) as conspirators. I charge you that a defendant cannot be convicted because of his acquaintance or association with some or all of the conspirators named in the indictment unless it is proven by the Government beyond a reasonable doubt, that the defendant Switzer had guilty knowledge of, and with such knowledge, participated in the conspiracy or in furtherance thereof.

6. Admissions made by any of the alleged conspirators are to be regarded only when made during the operation or carrying out of the conspiracy. Once the conspiracy is ended, either by failure, success or arrest, such admissions made by the other defendants or conspirators are

incompetent as against the defendant Switzer and the jury is instructed to disregard and ignore such admissions.

7. The Government introduced proof that in a number of instances, interest charges were made by money lenders or factors, clients of the defendant Switzer, at rates in excess of 6 per cent per annum and in some instances at rates of 10 per cent per month. I charge you as a matter of law, that the rates of interest charged to or paid by (1377) Berkeley Jewelers, Inc. on loans made to it by money lenders or factors introduced by the defendant Switzer, are completely irrelevant to the violation charged in the Third Count of the Indictment and cannot be used by you as evidence of guilt by the defendant Switzer as to the crime of conspiracy. It is perfectly lawful to charge any interest rate on loans to a corporation, if such rates are agreed to by the borrowing corporation.

8. The Government introduced proof that in a number of instances, when the defendant Switzer acted as counsel for some of the alleged conspirators such as Faskow, Shulman, Shear and Mintz he advised them not to give statements to the prosecuting agents or testify before the Referee in Bankruptcy or the Grand Jury and to avail themselves of their constitutional privilege. I charge you, that the defendant Switzer, as counsel for the other defendants, had a right and a duty to advise them of the constitutional privilege which is available to every person, not to testify or give evidence which might incriminate such a person. The (1378) fact that the defendant advised the other defendants, for whom he acted as counsel, to avail themselves of the constitutional privilege, cannot and must not be used by you as proof in support of the charge of the crime of conspiracy charged in the Third Count of the indictment.

Defendant Switzer's Requests to Charge

9. The witnesses Faskow, Shulman, Shear, Mintz and Fellerman, who testified for the Government, are named in the Third Count of the indictment as co-conspirators with the defendant Switzer. Some of them, such as Faskow and Shulman, have pleaded guilty to the conspiracy. Shear had the charge against him severed. While the testimony of conspirators, who admit their guilt or participation in the conspiracy, need not be corroborated, it should, however, be scrutinized by you with much greater care than that of any other witness. You should particularly consider the interest or motive that these witnesses have in giving their testimony in this case. For when a witness has an interest, the temptation is strong to color his testimony or fabricate certain facts. You should weigh all of these factors in considering how far and to what extent the testimony of such (1379) witnesses is worthy of belief.

10. Some of the proof offered by the Government consists of admissions and conversations between the Government witnesses and the defendant Switzer, not otherwise corroborated. While such testimony to be admitted in evidence, need not be corroborated, I charge you however that the testimony of such admissions and loose conversations should be cautiously considered by you. They are often incapable of contradiction, they are seldom anything more than vague expressions of a witness of what he thinks he has heard another say, stated in his own language, without the qualifications or restrictions, the tone manner or circumstances which attended their original expression.

11. The credibility of a witness is solely for you, the jury, to decide. Subject the testimony to the same scrutiny

that you would subject any important conversation or act. The mere fact that a witness was called by the Government or is a Government agent, does not entitle such a witness' testimony to more weight or credence than that of any other witness.

(1380).

12. The defendant Switzer took the stand and testified in his own behalf. He admitted substantially that he arranged for the execution of the confessions of the judgments charged in the indictment, the arranging of the Marshal's sale and the organization of Berkeley Pennsylvania Corporation as well as the arranging for the transfer of what he believed to be, as he testified, the collateral merchandise to Bucknell Trading Company. He explained the circumstances under which these acts were committed and he stated that he realized shortly thereafter that he did not act prudently as a lawyer and arrange to return the merchandise sold at the Marshal's sale and to settle the claim of the trustee in bankruptcy against Bucknell Trading Corporation. He also testified that no merchandise of Berkeley Jewelers, Inc. was turned over to Berkeley Pennsylvania Corporation and that the main reason for having Irving Shear take title to merchandise at the Marshal's sale and having Shear, a brother-in-law of his, become president of Berkeley Pennsylvania Corporation and having him alone sign checks of the new corporation, was that he, (1381) Switzer, wanted to make sure that Faskow should have no opportunity to conceal any of the assets, or divert any of the money of the new corporation; that by organizing the new corporation, the creditors of the old corporation were in fact benefited in that the bankrupt estate of Berkeley Jewelers, Inc. was relieved of the liabilities to the "lay away"

customers. Defendant Switzer further testified that when he counseled the doing of all of the aforesaid acts, he did that, not wilfully, and not for the purpose of defeating the bankruptcy act. You heard the defendant Switzer and you also heard the witnesses for the Government. If you believe the defendant Switzer's testimony, or, if after hearing his testimony as well as that of the witnesses for the Government, you have a reasonable doubt as to the defendant Switzer's guilt, then I charge you, that you must acquit the defendant Switzer of the charge contained in the Third Count of the indictment.

13. The defendant Switzer is charged in the Second Count of the indictment that "from on or about the 1st day of May, 1950, and continuously thereafter, up to and including the 31st day of (1382) May, 1950 * * * he did unlawfully, wilfully, knowingly and fraudulently concealed property belonging to the estate of the bankrupt * * * consisting of watches, rings and miscellaneous jewelry". This charge refers to the trays taken out of the safe by the defendant Switzer on or about May 2, 1950 and voluntarily delivered to F. B. I. Agent Bennett on May 31, 1950, together with a letter then ready to be mailed to the attorneys for the trustee of the bankrupt estate. You heard the testimony of both the Government witnesses and that of the defendant Switzer as to that transaction. I charge you that if you believe the defendant Switzer's testimony on that subject or if you have a reasonable doubt as to the guilt of the defendant Switzer concerning the charge contained in the Second Count of the indictment after weighing the testimony of both the defendant Switzer as well as that of the Government witnesses, then it is your duty to acquit the defendant of that charge.

Defendant Switzer's Requests to Charge

14. A conviction cannot be had upon strong suspicion or probabilities of guilt, nor as in civil cases, upon a mere preponderance of (1383) evidence. Guilt must be established beyond a reasonable doubt.

15. A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit.

16. An indictment is only a charge. It has no probative value. It carries with it no implication of guilt.

17. The defendant Switzer is innocent of the charges against him alleged in the indictment unless proven guilty on the evidence presented at the trial beyond a reasonable doubt. The burden is upon the Government to prove beyond a reasonable doubt the crime charged in the indictment. That burden never shifts. The (1384) defendant need not prove his innocence. If on the whole proof, the evidence is as consistent with guilt as with innocence, it is the jury's duty to acquit.

18. If you find that any witness has made a material misstatement of the facts, you may disregard that part of his testimony which you find to be false and you may accept that part which you believe; or you may disregard all of his testimony if you believe that the witness has wilfully given false testimony and is a person unworthy of belief.

Defendant Switzer's Requests to Charge

19. The fact that the Court has denied certain motions by the defendant to dismiss the indictment or for any other reason, is not to be taken by you as in indication that the defendant is believed by the Court to be guilty or as an indication of the guilt or innocence of the defendant. The denial of such motions was merely a denial of the motion on questions of law.

20. Arguments of counsel addressed to the Court upon questions of law and upon motions for the admission or exclusion of evidence, are to (1385) be disregarded by you and if any answer to a witness was excluded or stricken from the record, you are to entirely disregard the question and answer, for you may only consider matters admitted in evidence.

21. The Court decides questions of law only. The jury decides all questions of fact. You are the exclusive judges of the relative importance and credibility of the witnesses.

22. If the Court or counsel have referred to testimony and if either the Court's reference or that of counsel differs from your recollection of the testimony, follow your recollection. You are the sole judges of the facts.

23. I charge you as a matter of law that in arriving at your verdict, you must pass only on evidence as received in this trial. Suspicion or speculation have no place in a jury's determination of the guilt or innocence of any defendant.

(1386) • • •

Charge of the Court

The Court: Now, ladies and gentlemen, I must first of all thank you for your promptness throughout the trial and for the obvious attention that you have given to all the proceedings while they were going on. We have come to that part of the case now where it is about to be submitted to you for decision. Some of you have served on juries before and you probably have heard a good many of the things that I will say here this morning. But I think it is a good thing to repeat them.

You, of course, are the sole judges of the facts in this case and of the credibility of witnesses and of the weight of evidence. Those are matters which concern you alone and are your province. My province is to tell you what the (1387) law is. If I tell you what the law is, you accept it, even though you might disagree with it, because if I make a mistake on questions of law there are ways of correcting them. I will try to keep out of the fact province. If I say anything that does not coincide with your recollection, you don't have to take my recollection of that at all if it disagrees with yours; in the course of my instructions to you if I should comment on the evidence and if my recollection of the evidence differs from your own, disregard what I say and rely on your own recollection of the evidence.

Now, this business of finding what the facts are is a process that may sound mysterious when you hear it mentioned in a courtroom, but it is not anything different from what we are all doing in our ordinary lives every day. It simply means that you take all the testimony of the witnesses together with whatever exhibits have been

received in evidence and you consider them; then you draw from them such inferences of fact as your experience and your common sense tells you that they support and justify, and from that you (1388) try to determine and you do determine what is the truth, what are the true facts in the case. As I say, that job is yours and yours only, and not mine.

There are certain things that you have to be a little bit careful about. You must not draw any inferences for or against any party because of any rulings that I have made in sustaining or overruling objections as to evidence; those rulings are on questions of law and do not indicate any point of view of the Court one way or the other. Then I must call your attention again to what I said to you during the trial. You remember while Mr. Switzer, the defendant, was on the stand I had occasion two or three times to admonish him not to be so expansive in his answers, to answer a little more sharply the questions that were put to him. That was in no sense an indication that I felt that Mr. Switzer was not trying to answer truthfully; I thought he was talking a little beside the point of the question. But it is something that you should put completely out of your minds. It indicates no bias on my part on the question of (1389) his guilt.

Further, you must not infer from the fact that I asked several questions that I have any opinion as to the facts of the case. Any time I asked questions I did so because I thought it might save time and move the case along, or because I thought it might be helpful in clarifying the testimony. It was not in any sense to indicate that I have any personal opinion as to the facts in the case. I have tried to avoid giving any such impression. But if

anything that I did or said gave you the impression that I leaned one way or the other in the case, I ask you to believe me that you are mistaken and to put any such notion out of your mind.

You must make up your own minds as to what the facts are. You do that from a consideration of all the evidence which has been received and which you recall. As I told you, it is your own recollection of the evidence that is important, not my recollection, or not the recollection of counsel for both sides.

You are also the sole judges of the credibility of witnesses. Credibility, of (1390) course, is merely another name for believability. Here again when you undertake to determine the believability or the credibility of a witness you are doing something which you do every day in your life; every day and all the time you are making decisions or you are refraining from making decisions or refraining from doing things because you rely on somebody else's word. In making up your mind whether or not to believe any witness you may, and I should think you would, take into consideration certain elemental and rather obvious factors. First of all, has the witness some interest in the outcome of the case which would be served by getting you to accept what he says as true? Then, how did the witness impress you when he was on the stand? What was his demeanor? Did he give you the appearance and the impression of being frank and truthful? Did he impress you as somebody who knew what he was talking about? What were his powers of observation and recollection, his opportunity to observe, and is what he said credible in the light of all the other evidence in the case? Is it credible in the light of (1391) your own common sense?

Now, you may have other additional tests which you apply in the daily affairs of your own life. If you have any such tests other than these that I think are obvious, you use your own tests, as well as these I suggest. Use your own tests if you don't like the ones I suggest, because credibility is a matter for you.

However, I should point out to you that Switzer, the defendant who is on trial here, obviously has a very great interest in the outcome of the trial. That is perfectly obvious to you. Faskow and Shulman, as they testified, have pleaded guilty to the third count of the indictment, the conspiracy charge, and their testimony as co-conspirators together with that of Mintz and Fellerman, who are also named as co-conspirators, but not named as defendants, and also the testimony of Irving Shear, who has not pleaded guilty, but as he testified on the stand and was explained to you by counsel, the charge against him has been severed, meaning it has not yet been disposed of, but he is named as a defendant—I am correct in that, am I not?

(1392)

Mr. Stim: Yes.

Mr. Schwartz: Yes.

The Court: (Continuing) So that testimony, the testimony of those men who are co-defendants and conspirators should be scrutinized rather carefully. In your scrutiny of their testimony you should consider any documentary evidence and the testimony of any other witnesses, including the defendant Switzer, which you may think corroborates the testimony of Faskow, Shulman, Mintz, Fellerman, and Shear.

On this question of credibility, if you believe that any witness when he was on the stand lied you may disregard every word of his testimony, or you may accept so much of his testimony as you believe to be true, such testimony as you believe is corroborated by other credible evidence in the case, and you may disregard only what is false. There again, that is a matter entirely within your hands, how much of a witness' testimony you will accept.

The fact that a witness may have an interest in the outcome of a case does not mean that his testimony is necessarily and inevitably (1393) false. To be sure, it may be false, but it is, as I say, not necessarily so. However, when a witness has an interest in the outcome of any case, that interest may cause him even unconsciously to color his testimony so as to serve his own interest. It may cause him to recall more clearly those circumstances and events which promote his interest, rather than those which do not.

Then, too, some witnesses may have a greater or more immediate personal interest to be served than others. You may take all of these possibilities into account when you are considering this matter of credibility.

Bear in mind that you are not bound by what counsel say as to the credibility of witnesses or by my own. You are the sole judges of the credibility of witnesses.

You are also the sole judges of the weight of the evidence. Here again judging or determining the weight to be given to any evidence in a case is a common enough experience; it is something that we all do in our regular every-day affairs in life.

(1394)

The weight of the evidence means merely its power to persuade you of the truth of the proposition in support

of which the evidence is offered. Your determination then should as a matter of common sense and reason be based on the test of the quality of the evidence, and not on the mere quantity of exhibits or the quantity of witnesses or the length of time a witness is on the stand or how many times he says something. You frequently have to make judgments of this kind in your own affairs and you should proceed here as you do in your own daily affairs.

The defendant, Morris Switzer, is charged here with two crimes. The first charge is set out in the second count of the indictment, and the second charge against him is set out in the third count of the indictment. It is a crime for anyone knowingly and fraudulently to conceal from a trustee in a bankruptcy proceeding any property belonging to the estate of the bankrupt.

The second count charges Morris Switzer with the commission of that crime. Conspiracy to violate any law of the United States is itself (1395) a crime, that is, the act of conspiring is a crime.

The third count, which is the second charge against Mr. Switzer, charges that he, Switzer, and others named in the third count, that is, Faskow, Shulman, Shear, Mintz and Fellerman conspired to violate a law which makes it a crime for an officer or an agent of a corporation in contemplation of a bankruptcy proceeding against that corporation, or within intent to defeat the bankruptcy law, knowingly and fraudulently to transfer or conceal any of the corporation's property.

Bear in mind that these two offenses are the only offenses with which the defendant Switzer is charged; he is not charged, for instance, with any offense, such as exacting excessive interest charges on loans that were made to the Berkeley Corporation. Indeed, there is not

any law which limits the amount of interest that may be charged to a corporation if the arrangement is made between the corporation and its lender. Apart from that, Switzer is not charged with any offense of exacting excessive interest. So I repeat, you have only (1396) to pass on the two charges which have been made by the grand jury here in this indictment, namely, the charge that he knowingly and fradulently concealed property belonging to the bankrupt from the trustee, and, secondly, that he conspired with others in contemplation of bankruptcy knowingly to transfer property of the corporation.

Bear in mind that the indictment and these charges which are contained in the indictment are merely charges made by the grand jury that the defendant has committed the crimes charged; the indictment is no proof whatever that he committed the crimes charged. Nor is the indictment evidence of any kind against the defendant.

You must not draw any unfavorable inference against the defendant because of the filing of the indictment. The indictment's function is to inform the defendant of the charges made against him so that he may be brought into court and answer, and the defendant Switzer has answered in this case by denying the charges, and, indeed, as you know, he took the stand and testified in support of that denial.

(1397)

Accordingly, you must bear in mind that a defendant in a criminal case, and, particularly, this defendant, Mr. Switzer, is presumed to be innocent of each of the offenses charged against him and that this presumption of innocence remains as to each of the charges until such time, if that time ever arrives, as all twelve jurors who

will consider this case after full and careful consideration of all the evidence are satisfied beyond a reasonable doubt that he is guilty of the charge.

Accordingly, if after considering all of the evidence in the light of these instructions you determine that the totality of facts as you find them to be in this case is as consistent with the innocence as with the guilt of the defendant, then you must acquit him. The defendant, bear in mind, is not required to prove his innocence. On the contrary, the burden under our system of law is on the Government, and that burden is to prove each element of the crimes charged and to establish the defendant's guilt as to each of those crimes to your satisfaction beyond a reasonable doubt.

The second count of the indictment reads as follows:

(1398)

> "1. On or about the second day of February, 1950, an involuntary petition in bankruptcy was duly filed in the United States District Court for the Southern District of New York, praying that Berkeley Jewelers, Inc. be adjudicated bankrupt; on or about February 20, 1950, Berkeley Jewelers, Inc. was duly adjudicated bankrupt; on or about April 6, 1950, a trustee in bankruptcy was duly elected and qualified to act as trustee on behalf of the estate of said bankrupt.
>
> "2. From on or about the first day of May, 1950, and continuously thereafter, up to and including the 31st day of May, 1950, at the Southern District of New York, Morris H. Switzer, the defendant, did unlawfully, wilfully, knowingly and fraudulently conceal property belonging to the estate of said bankrupt from the trustee in bankruptcy, consisting

of watches, rings and miscellaneous jewelry, the value of which to the grand (1399) jurors is unknown."

Now, this count concerns those trays of watches and rings which Switzer admittedly took from the safe at the 29th Street premises and brought to his office. Certain facts concerning this count are, as I recall the testimony, not in dispute.

First, it is not disputed that Mr. Switzer did, in fact, take physically the trays and watches from the safe at 29th Street and bring them to his office. It is not disputed that when he did so the bankruptcy proceeding was in existence and pending and that the trustee was serving in his office, that is in his official capacity as trustee, and that he was available to receive and take possession of any property belonging to the bankrupt estate.

Moreover, it is not disputed that Mr. Switzer did not, in fact, ever physically turn over these watches and rings to the trustee.

You have heard the testimony of Mr. Frier, the attorney for the trustee, who testified in court. As I recall his testimony, he said that some time in May, early in May, I think he said, (1400) the defendant Switzer asked permission to go to the bankrupt's premises because, he said, he was interested in arranging for the disposal of the fixtures that had been left there and the safe that had been left there. Mr. Frier said he gave permission. Then Frier said that shortly after that he learned that when Switzer had left the premises he was carrying out certain material or certain matter under his coat. He said he called up Switzer about it and Switzer said, no, he had not taken anything.

Frier, as I recall it, said, "Well, that is what I have been told and I will check further on it and I will be in touch with you." Then he said later on he did call up Switzer and Switzer said he did have a few things, but they were worthless trinkets and he was going to write to him and arrange to give them to him. Then it was the testimony of Carl Johansen, the elevator operator, that he saw Switzer come in and go to the safe and saw him take something out and put it under his coat and leave the building.

Switzer in his testimony does not deny that he took these. His version is that he went up (1401) there one day to see about selling the safe and that either the safe had been opened at the same time by somebody else or some time previous by the safe man, and that when he looked in there he saw these things and was surprised and didn't know they were there and picked them up and brought them back to his office and he intended to turn them over to the trustee.

Now, some weeks passed concededly between that date and the date that Agent Bennett went into his office with the warrant for arrest and there took possession of the trays. You will recall at that time that he found that letter which Mr. Switzer told us about which he said he wrote, and you have the letter in evidence, Exhibit 20, I think it is. You will take that into consideration. But, at least, those facts are clear, that the property was taken out and was taken to his place.

Switzer's story disputes that of Mr. Frier as to what happened. Switzer says as soon as he had that property he called up Frier and told him about it. He said he was going to send it to Mr. Frier, and that for one reason or another (1402) he was busy and didn't get around to sending them down, but on the 29th of May he did write

the letter. It is not disputed that there was a period of several weeks between the time he actually picked them up at the 29th Street premises and the date he wrote the letter. Switzer also in his answer to direct questions by his counsel denied from the stand the charge in the terms of the charge. He denied that he fraudulently and knowingly concealed the watches and rings from the trustee. So on that issue you have a pretty clear cut issue of credibility.

It is for you to determine whether or not he concealed the property and whether he did so knowingly and fraudulently, that is, with an intent and purpose to cheat the bankrupt estate of property which he knew it was entitled to have.

If you accept and believe Switzer's testimony on this point, you must acquit him on that charge. That is the second count of the indictment. If, however, you do not accept his testimony, if you accept the contrary testi-
(1403) mony and if from all the testimony which you believe and recall concerning the second count, if from all of that testimony you are satisfied beyond a reasonable doubt that Switzer fraudulently and knowingly concealed the watches and rings from the trustee, then it is your duty to find him guilty upon the second count.

The third count, as I have said, charges that Switzer, Faskow, Shulman, Shear, Mintz and Fellerman conspired to violate the statute which makes it a crime for an officer or agent of a corporation in contemplation of bankruptcy by that corporation of which he is an agent or an officer with intent to defeat the bankruptcy law knowingly and fraudulently to transfer or conceal any of the corporation's property. Here again several facts are not in dispute.

One, there is no dispute that some time—what is the date of those confessions of judgment?

Mr. Schwartz: December 15, 1949.

The Court: (Continuing) It is not disputed, for instance, that on December 15, Faskow, president of Berkeley Jewelers, Inc., signed four confessions of judgment in four named actions where the claim (1404) in each action was $1,000. He executed those confessions of judgment. They were in the name of Fellerman. That was based on the arrangement between Mintz and Fellerman. It was money that Mintz and Fellerman had jointly advanced to him in the sum of $4,000. It is not disputed that those executions of judgment were filed in the Municipal Court. The judgments were issued and pursuant to the execution the Marshal made a levy, and, ultimately, the Marshal made a sale.

It is not disputed that at that sale a large amount of merchandise was purchased by money supplied by Mintz, $1,300. Everybody has testified, as I recall it, that the merchandise that was taken for that $1,300 was worth a great deal more.

It is not disputed that large amounts of this merchandise were removed from the premises on 29th Street, some time at night. They were moved to private homes on Long Island and to various warehouses, and that some of the merchandise was sold at private sales, that is, at Lipson's home. Furthermore, it is not disputed that along in (1405) January a certificate of incorporation was filed for a new corporation to be known as the Berkeley-Pennsylvania Corporation, and that the purpose and arrangement was that the Berkeley-Pennsylvania Corporation would take over the so-called lay-away plan that Mr. Faskow had been operating.

Now, Faskow, Shulman and Shear have given their versions as to the circumstances under which these various things were done, and Switzer has given his.

Faskow has told us that in December bankruptcy was imminent and that he talked bout it to Switzer. Switzer says he didn't know that there was danger of bankruptcy, that up until the collapse of what he called the Shapiro negotiations for new money he thought everything was going to be all right and that the corporation could survive and pay its debts. He says he was amazed and shocked and when he found out that Faskow had so many outstanding obligations as he told him about and that there was no intention at any time to take away any property that might belong to the trustee, there was no contemplation of bankruptcy, and that, in any event, whatever he (1406) did he didn't do in conspiracy with anybody else.

There again you have this question of credibility. Recall all the evidence you can remember, assess such weight to it as you think it deserves, accept so much of it as you think you should believe, disregard what you don't believe, then it is your job to determine whether or not on the basis of all the testimony Switzer is guilty of the charge against him. If you believe Switzer's version, you pretty much have to acquit him. If you don't believe Switzer, if you believe the others, then you could find from the testimony that he is guilty of the charge. If you so find beyond a reasonable doubt, then it would be your duty to find him guilty.

Now, we were talking about conspiracy. What is a conspiracy? A conspiracy is a partnership in crime, and as common experience shows, an agreement of that kind is

not likely ever to be formally arranged or openly announced, and so it is seldom, if ever, susceptible of direct proof. It almost always has to be deduced from acts and (1407) circumstances or from words spoken in furtherance of it. In other words, it has to be arrived at, if you do arrive at the conclusion that there was a conspiracy, from circumstantial evidence.

Accordingly, in order to find that a conspiracy existed it is not necessary for the proof to show that all the conspirators met together and entered formally into an explicit agreement to accomplish an unlawful purpose, or that by speech or writing they set out the detailed scheme or schemes by which they hope to accomplish it. Neither is it necessary for the proof to show that the conspirators, in fact, accomplished or succeeded in accomplishing the unlawful object. To be sure, if such success be shown, it is very strong proof of their agreement to achieve it. But it is not necessary to show even full or partial success of the crime; it is sufficient that the proof shows the conspirators in any manner or through any means, implied or otherwise, came to a mutual understanding to accomplish an unlawful purpose and that one of them while adhering to the (1408) conspiracy did at least one act to further the accomplishment of the purpose of the conspiracy. Such act need not in itself be a criminal act. Indeed, it may be a completely indifferent act, such as drawing up a bill of sale, making a telephone call, having a conversation. Accordingly, any act, innocent or otherwise, is sufficient if you find it has been done by any conspirator during the existence of the conspiracy and to effect its object.

Now, obviously, once the conspiracy is terminated, that is, if you find the conspiracy terminated when the trus-

tee began to bring in the property, or if you find that the conspiracy ended at any other time, whenever you find that the conspiracy ended, any statements made by any co-conspirator after the end of the conspiracy is not binding on another conspirator. Moreover, it is not necessary that each conspirator be a member of the conspiracy from its beginning, nor is it necessary that each conspirator know all the others. Anyone who at any time during the existence of the conspiracy having knowledge of its unlawful purpose joins that common effort to (1409) accomplish that purpose becomes a conspirator, just as if he had been in it from the beginning, and he is bound by what his partners have done and said in furtherance of the conspiracy from its inception.

A conspiracy once found to exist, which by its nature is not ended merely by lapse of time, is deemed to continue in existence as long as the evidence shows an intention to continue it or until the evidence shows some affirmative and definite act which terminates it.

During its existence each member of the conspiracy is an agent of every other member, and thus any act or declaration by one member during the life of the conspiracy and in furtherance of its unlawful purpose is not only evidence against that one, but also evidence against each and all of the others as well, just as if each himself had done the act or made the declaration.

It is of no consequence that a conspirator's part in a common effort may be a subordinate one if whatever he did was done with knowledge of the conspiracy and in order to help the joint effort (1410) to accomplish the unlawful purpose, that is sufficient.

Now, to be sure, a conspirator may withdraw from the conspiracy, but it requires affirmative and effective action

on his part to withdraw and thus terminate his participation in the conspiracy.

Now, I have indicated that in the matter of the conspiracy it is almost always necessary to determine, if you do determine that there is one, to do so by drawing inferences from other evidence. So it is your function here to compare and weigh and consider all the evidence you can recall in the light of your experience and common sense, to draw from it such inferences of fact as are natural and reasonable, and then from all of the facts as you find them to determine whether or not the defendant is guilty of the charges which have been made against him here.

Now, evidence, as you may know, consists of direct testimony to a fact, or it may be testimony as to circumstances from which that fact may be inferred. The latter type of evidence is (1411) called circumstantial evidence. It is evidence which tends to prove or disprove a disputed fact by proof of other facts which have a natural and reasonable tendency to lead the mind to a conclusion as to the existence or non-existence of a disputed fact. I dare say that you are all familiar with that kind of process in your experience.

In your deliberations, then, you may find by drawing natural and reasonable inferences from circumstantial evidence that certain facts have been established. If you do so, those findings of fact will be just as valid as the findings of fact that you make from direct evidence.

In either event, in this case before you can find the defendant guilty you must be satisfied from all the evidence, whether it be direct or circumstantial, that he is guilty beyond a reasonable doubt. If you are not so satisfied, that is, if you are not satisfied beyond a reason-

able doubt, you must acquit him. I am sure you realize that guilt is an individual thing. Accordingly, you determine as to this defendant individually whether he knowingly and wilfully (1412) was, in fact, a member of the conspiracy with which he is charged, that is to say, you must determine as to him whether he actually entered into the conspiracy charged. You do that from the evidence which you recall and believe concerning his own actions, his own conduct, his own declarations and statements and his own conversations.

If after a consideration of that evidence you find that this defendant was a member of the conspiracy, then everything that every other person that you find was a member of the conspiracy did or said is binding on him. If you find that he was not a member of the conspiracy, then, of course, as I said to you before, you must find him not guilty. But if after consideration you find that he was a member of the conspiracy, he is bound by what the others have done, and it would be your duty in that event to find him guilty. But you would have to be satisfied of his guilt beyond a reasonable doubt.

What is reasonable doubt? In the first place, it must be an actual doubt, and not a mere possibility of doubt. As is obvious from the (1413) term itself, it must be based on reason. Moreover, it must arise from the evidence or lack of evidence as you recall it and evaluate it. It cannot arise from mere whim or caprice or from sympathy or from a disinclination to perform whatever may be an unpleasant duty. It is the kind of doubt which would cause reasonable men and women to hesitate before acting in matters of importance in their own private affairs.

Accordingly, if your consideration of the evidence in the manner which I have just described to you produces in your minds a settled belief of the defendant's guilt, such certainty as you would act on in your own important affairs, then you would be free from reasonable doubt.

Now, this of course, does not mean that you must have absolute or mathematical certainty because, as I am sure you know from your own experience, there is hardly any proposition in life which is susceptible of any such precise and absolute demonstration. It means merely that you must have such certainty as in the light of your reason and common sense you believe you (1414) ought to rely and act upon.

Now, it just occurs to me that there is one thing more that I ought to caution you about. Faskow and Shulman have pleaded g[illegible] Their pleas of guilty relate to themselves, except in [illegible] far as you may think that affects their credibility. I warn you that their pleas of guilty are in no way binding on this defendant, and you must be very careful not to consider that in determining whether he is guilty. They were pleading for themselves. That is no admission against him in any way.

To arrive at your verdict each juror must make up his own mind after a consideration of all the evidence as it is recalled. That consideration should include the views and opinions of each of your fellow jurors, as well as your own. You are not, I am sure you realize, engaged in a mere poll-taking process where each person registers his opinion in a sort of irrevocable way and drops it into a box for the statisticians to go to work on. It is the essence of the jury system that all of the jurors will listen to the views of one another, and they will (1415) do so with open minds and with the disposition to accept the

views of their fellow jurors if their fellow jurors' reasons are persuasive and if they are based on the evidence and if they are not contrary to the instructions which the Court has given.

This, bear in mind, does not mean at all that where a juror after the kind of consideration I have just suggested comes to a firm conclusion that he should ever yield that firm conclusion merely for the sake of conformity, merely for the sake of going along or being unanimous. He should not. Each of you has taken an individual oath. It means only that before you say to yourself, "This is the position from which I will not recede," you should give full consideration to all of the views of your fellow jurors, because it is important that you try to reach a unanimous verdict, for in this court unanimity is required. A verdict must be the unanimous verdict of the jurors. You may have served in other courts where less than twelve jurors may render a verdict. Here that is not so. In order to have a verdict, whether it be not guilty or guilty, (1416) it must be unanimous.

Now, as to the form of your verdict, ladies and gentlement, I wish you to bring in your verdict as to each count. On Count 2 your verdict will be not guilty or guilty; on Count 3, separately, your verdict will be not guilty or guilty.

We have to wait here a minute because counsel may have some matters that they think I have wrongfully instructed you on, or they may think I have omitted some matters which I may have to call to your attention.

Mr. Stim: I have no exception to your Honor's charge whatsoever, except that I respectfully ask your Honor to charge the jury along the lines that I suggested in item 8.

The Court: Let me see it. Well, which part? I have already covered the matter of interest.

Mr. Stim: 8, your Honor.

The Court: Oh, yes. Some of the witnesses testified that when they were called before the trustee in bankruptcy or when they were told that they had to come down to the grand jury that (1417) they took up with Mr. Switzer that matter. Each of them, as I recall, Faskow and Shulman and Shear, maybe somebody else—I don't know—said that Mr. Switzer told them not to give any information. You may recall that they testified and each of them said that he testified falsely before the grand jury. Now, Mr. Switzer was the attorney for the bankrupt. I don't recall any testimony that he was the attorney for Shear, although Shear was his brother-in-law. He testified that he represented Mr. Shulman in the Bucknell Trading Corporation.

Now, Mr. Switzer as attorney for any client whom you find was a client would be, of course, justified in instructing his client as to the client's constitutional right that he might refuse to testify on the ground that to testify would degrade an incriminate him.

Does that satisfy you?

Mr. Stim: Yes.

The Court: All right, ladies and gentlemen.

Mr. Stim: No objection.

The Court: The charge is satisfactory?

(1418)

Mr. Stim: The charge is satisfactory.

The Court: If you think there is some omission here that leaves the matter unclear, you can call my attention to it.

Mr. Schwartz: May I request for the record that the Court charge either in the language set forth or in the

substance request No. 15 of the Government, or may I request that the Court say something on that subject.

Mr. Stim: I think your Honor made a ruling on that.

The Court: No, I won't mention that at all, no.

Very well, Mr. Clerk, I think we can excuse the alternate juror.

Thank you very much. We appreciate that you were here ready to step in if you were needed.

(Alternate juror excused.)

The Court: If you desire any of the exhibits the Clerk will give you some note paper and you can send in a note. If you desire any further help from the Court, you may ask for it.

(Jury retired to deliberate 11.27 a. m.)

While the jury was deliberating the (1419) following took place:)

The Court: I have a letter from the jury. They want the indictment. The jury wants the letter that Switzer wrote to the trustees, that is, Exhibit 20.

Let the record show that the indictment and Exhibit 20 is being given to the jury.

(The jury took its place in the jury box at 1.00 p. m.)

The Clerk: Have you agreed upon a verdict, Mr. Foreman?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: On the second count we find guilty.

The Clerk: On the third count?

The Foreman: Guilty.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded:

You say you find the defendant guilty on Counts 2 and 3 of the indictment, and so say you all?

Motion to Set Aside Verdict—Denied

Motion for Arrest of Judgment—Denied

(The jurors responded in the affirmative.)

The Clerk: Do you want the jury polled?

Mr. Stim: Yes.

(1420)

(The Clerk polled the jury.)

The Court: Very well, ladies and gentlemen, thank you very much. I thank you for your deliberations, and in my opinion I will say that your verdict is consistent with the evidence in the case.

(Jury excused.)

Mr. Stim: Your Honor, the defendant moves to set aside the verdict of the jury as being contrary to the law, contrary to the evidence, and on all the rules of Federal Criminal procedure.

The Court: Motion denied.

Mr. Stim: Exception.

The defendant moves for an arrest of judgment, your Honor.

The Court: Motion denied. What is the ground of the motion for arrest of judgment?

Mr. Stim: Well, I have not a particular ground to state at present, your Honor.

The Court: Motion denied.

Mr. Stim: Exception.

Mr. Schwartz: The Government moves that the defendant be remanded to custody.

The Court: Is the defendant now on bail?

Mr. Stim: He is now on $500 bail. He is (1421) an attorney, your Honor. I would like very much that your Honor order a probation report in this case before sentence and that your Honor continue him in bail. He will be here. He lives here and is always available.

The Court: No, I won't continue the same amount of bail. I will continue him in bail, but I think the bail ought to be increased and I set the bail at $2,500.

Now, I will give you until 4 o'clock to post bail. In the meantime, the defendant will be placed in your custody. He will be in your custody until the bail is posted, and that is not later than 4 o'clock.

Now, do you desire to have a pre-sentence report?

Mr. Stim: I think there should be a pre-sentence report in this case, your Honor.

Mr. Schwartz: May we also order pre-sentence reports for the two defendants Shulman and Faskow, who have pleaded guilty, and have the sentencing for these defendants set on the same date as the defendant Switzer?

The Court: I don't know whether the (1422) attorneys that represent those defendants have expressed any opinion on that, but, in any event, I will do that, because I would certainly prefer to have a pre-sentence report before sentence. I will order pre-sentence reports for the defendant Switzer and for the defendants Faskow and Shulman also, and I will set the sentencing for Friday, May 11.

Mr. Stim: At 10:30 a. m.

The Court: 10:30.

Very well. Anything else?

Mr. Schwartz: The Government has nothing else, your Honor.

The Court: Friday, May 11, at 10:30. At present it appears that I am scheduled to be in courtroom 1506. But you better check on that beforehand, because that courtroom may be re-arranged.

(Adjourned to Friday, May 11, 1956, at 10:30 a. m.)

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 702 MISC.

MORRIS H. SWITZER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1957

No.

MORRIS H. SWITZER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed his conviction for violations of Section 152, first subdivision, Title 18, U. S. Code and Sections 371 and the sixth subdivision of 152, Title 18, U. S. Code upon two counts of the indictment and which affirmed an order denying his motion in arrest of judgment and for a new trial on the ground of newly discovered evidence.

(A) The Opinions Below

The opinion of the District Court with respect to the motion in arrest of judgment and for a new trial on the ground of newly discovered evidence has not yet been

officially reported; a copy thereof is hereto annexed as an appendix. The opinion of the Court below has been officially reported in 252 F. 2d 139; a copy thereof is hereto annexed as an appendix.

(B) Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered and entered on January 28, 1958 (Pet. App. A).

2. Timely application for rehearing was made on February 10, 1958, and was denied on February 25, 1958. The time of the petitioner to file his petition for the writ of certiorari was extended to and including April 25, 1958, by an order of this Court dated March 18th, 1958 (Pet. App. B).

3. The jurisdiction of this Court is invoked pursuant to 18 U. S. Code, Rule 37 and 28 U. S. Code Section 1254.

(C) Questions Presented for Review

1. Whether the Court of Appeals erroneously affirmed the action of the Trial Court in conducting an essential part of the trial of the petitioner in the robing room of the Judge, in the absence of petitioner, who was then defendant, and while the petitioner was in the courtroom and without any waiver on the part of petitioner or the consent of petitioner in contravention of Rule 43 of the Federal Rules of Criminal Procedure, Title 18, U. S. Code, and in violation of his rights under the "due process" clause of the Fifth Amendment to the United States Constitution and in the taking of testimony in the trial in the absence of petitioner during a permitted absence of the petitioner from the courtroom for the purpose of going to the bathroom.

2. Whether the third count is fatally defective in that it fails to state a crime against defendant, this petitioner, for the reason that it does not allege that the defendant conspired with others to "knowingly and fraudulently" transfer property under the Sixth Subdivision of Section 152, Title 18, U. S. Code. The words "knowingly and fraudulently" being omitted from a description of the alleged proposed transfer in that third count; whether the Court of Appeals erroneously affirmed the failure of the Trial Court to charge the jury as to any legal criteria or definition of the word "fraudulently"; and whether the Court of Appeals erred in affirming the Trial Court's failure to instruct the jury on an essential element of the crime charged in the third count that the alleged proposed transfer was to be a transfer to Berkeley Pennsylvania Corporation.

3. Whether the petitioner was erroneously deprived of a fair and impartial trial in violation of his rights under the Sixth Amendment of the United States Constitution which provides that in all criminal cases, the accused is to be informed of the nature and cause of accusation, by the admission of evidence at the trial of a separate and independent crime not charged against him in the indictment; also by the failure of the Trial Court to instruct the jury that proof of the independent crime was not proof of the crime charged against petitioner in the third count.

4. Whether the Court of Appeals erroneously affirmed the action of the Trial Court in its failure to give petitioner a fair and impartial trial because the Trial Court adopted the role of prosecutor in conducting the trial; that the Trial Court asked at least 920 questions (petitioner's minimum count) on both direct and cross-examination of witnesses, including petitioner; and constantly erroneously rebuked petitioner and his counsel in the course of the trial and in the presence of the jury and

conveyed to the jury the Court's disbelief of petitioner's testimony.

5. Whether the Court of Appeals affirmed an abuse of discretion, contrary to the "interest of justice", on the part of the Trial Court in its denial of the motion in arrest of judgment and for a new trial when the newly discovered evidence materially and substantially altered the facts upon which the jury predicated its verdict of guilt on the second count.

6. Whether the Court of Appeals erred in affirming the following actions of the Trial Court;

(a) giving the indictment herein to the jury for consideration when count one thereof is not directed against this petitioner and without cautioning the jury not to read count one; (b) refusing to admit evidence under the "Completeness Doctrine", a document made competent by Government counsel who introduced portions of the document into evidence; (c) permitting the prosecutor in his argument to the jury to read portions of the Grand Jury minutes which were not in evidence; (d) permitting five Government witnesses to testify to conclusions without giving testimony of facts to support such conclusions; (e) failing to continue the case to enable a subpoenaed witness for the defense, who was temporarily ill to appear and give vital and effective testimony in favor of petitioner; (f) and failing to require a Government witness to produce vital documents in favor of petitioner as required by a subpoena duces tecum.

(D) Statutes and Rules Involved

Section 152, First and Sixth Subdivisions, Title 18, U. S. Code. *Concealment of assets; false oaths and claims, bribery.*

"Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, and any property belonging to the estate of a bankrupt, or"

"Whoever, while an agent or officer of any person or corporation and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation,

Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 371, Title 18, U. S. Code. *Conspiracy to commit offense or defraud United States.*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisonment for not more than five years, or both. If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Rule 12 (b) (2), Federal Rules of Criminal Procedure, Title 18, U. S. Code. *Pleadings and Motions before trial; Defenses and Objections.*

"(b) *The Motion Raising Defenses and Objections.*

(2) *Defense and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

Rule 30, Federal Rules of Criminal Procedure, Title 18, U. S. Code. *Instructions.*

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Rule 33, Federal Rules of Criminal Procedure, Title 18, U. S. Code. *New Trial.*

"The court may grant a new trial to a defendant, if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

Rule 43, Federal Rules of Criminal Procedure, Title 18, U. S. Code. *Presence of the Defendant.*

"The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent the continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

Rule 52 (b), Federal Rules of Criminal Procedure, Title 18, U. S. Code. *Harmless Error and Plain Error.*

"(b) *Plain Error.* Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Fifth Amendment to the United States Constitution.

"AMENDMENT V—CAPITAL CRIMES; DUE PROCESS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the United States Constitution.

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 6, Municipal Court Code of the State of New York. Pertinent text set forth in appendix.

Section 130, Municipal Court Code of the State of New York. Pertinent text set forth in appendix.

Section 660, Civil Practice Act of the State of New York. Pertinent text set forth in appendix.

Section 707, Civil Practice Act of the State of New York. Pertinent text set forth in appendix.

Article 3-A,—Sections 50-58 1 of the Personal Property Law of the State of New York. Pertinent text set forth in appendix.

(E) Statement of Case

Counsel for petitioner begs this Court's indulgence should this petition appear lengthy for the reason that they only recently came into the case and there has been insufficient time to thoroughly digest all of the facts and principles of law in the short space of time intervening, particularly when so many prejudicial errors are apparent and so many principles of law are involved.

This is an unusual and pitiful case. Here, a lawyer, the petitioner, was sold down the river by clients, although not being guilty of the crime of conspiracy, nevertheless took the easiest road and buried the petitioner for reasons they thought advantageous to their liberty. Of the five alleged co-conspirators, other than petitioner, for their cooperation, two were named as co-conspirators, but were not indicted. One had the case against him severed (R. 4), with the understanding that when the case against petitioner is disposed of, it will be dismissed. The fourth, who pleaded guilty, and whose sentence was deferred to a time after the disposition of the trial (R. 10), received a suspended sentence (R. 1462). And the fifth, who was the

sole defendant named in the first count, in which he was charged with the crime of using the mails to defraud in connection with a false financial statement to the extent of $230,000, was permitted to plead guilty to the conspiracy count, but not the first count of using the mails to defraud, for its effect upon the jury in the case against petitioner, had the first count dismissed with the Government joining in the motion to dismiss it (R. 1465), and, after sentence was deferred to the conclusion of the trial against petitioner (R. 8), had execution of his sentence suspended (R. 1464).

In addition to the almost impenetrable atmosphere created by the foregoing for its effect upon the jury, the Trial Court committed so many prejudicial errors in the conduct of the trial, with the participation in many of them by a willing prosecutor, that the conclusion is inescapable that petitioner's constitutional rights to a fair and impartial trial were violated. Those errors in the conduct of the trial were in addition to the errors committed by the Trial Court in connection with the substantive law involved.

In the appeal to the Court below, the Court of Appeals waived the necessity of the filing of an appendix in that Court by petitioner because of his straitened financial condition brought about by this case and by the expenses of an extended illness and death of petitioner's wife. The Government, however, filed an appendix on the appeal to the Court below. That appendix though, not only omitted testimony favorable to petitioner, the cross-examination of Government witnesses at which their testimony was broken down, but also omitted much of the proceedings where the errors occurred. In one instance particularly, the Court of Appeals was misled by such omission which will be discussed later in this petition. Where reference is made to the Government's appendix filed in the Court below, the page number will be preceded by the designa-

tion "Res. App." In instances of reference to the record, the page number will be preceded by the designation "R". Any reference to the appendix of petitioner annexed to this petition will be designated "Pet. App."

The indictment herein originally contained three counts. The first count was not directed to the petitioner but solely to one of the co-defendants referred to, not on trial, in which he was charged with that crime of using the mails to defraud, Title 18, Section 1341, U. S. Code (Pet. App.) which was severed (R. 3-4) and eventually dismissed (R. 1465).

The second count was addressed solely to the petitioner and charged him with the crime of knowingly and fraudulently concealing assets from a Trustee in Bankruptcy, Title 18, First Subdivision of Section 152, U. S. Code (Res. App. 1a).

The third count, although arising from the same bankruptcy case as was involved in the second count, was an independent and unrelated crime from that contained in the second count. Unfortunately Trial Counsel for the petitioner did not move the Trial Court for an election as to which count the Government would proceed to trial as provided for under Rule 14, Federal Rules of Criminal Procedure, Title 18, U. S. Code. That third count charged the four named defendants and two other persons, named as co-conspirators but not indicted, with a conspiracy, Title 18, Section 371, U. S. Code, in contemplation of bankruptcy and with the intent of defeating the National Bankruptcy Act, to transfer the property of one corporation, Berkeley Jewelers, Inc. to another corporation, Berkeley Pennsylvania Corporation, Title 18, Sixth Subdivision of Section 152, U. S. Code, under the following plan: That Jack Fellerman was an unsecured creditor of Berkeley Jewelers, Inc.; That defendants would cause Berkeley Jewelers, Inc. to confess judgments in favor of

Jack Fellerman, thereby enabling him to become a judgment creditor of Berkeley Jewelers, Inc.; That the defendants would cause execution to be had on said judgments and that the assets of that corporation would be levied upon by a Marshal of New York City and sold at the Marshal's sale; That a receipt (bill of sale) would be made out to a nominee of the defendants; That a new corporation would be formed, namely Berkeley Pennsylvania Corporation; "and that thereafter, in contemplation of a bankruptcy proceeding against Berkeley Jewelers, Inc. and with the intent to defeat the bankruptcy law, the assets of Berkeley Jewelers, Inc. would be transferred to Berkeley Pennsylvania Corporation." It is to be noted that the charging paragraph does not allege that the property of Berkeley Jewelers, Inc. would be "knowingly and fraudulently" transferred to Berkeley Pennsylvania Corporation (Res. App. 2a-4a).

In order to set out the facts of the case in chronological order, it is necessary to discuss the facts involved in the third count before those of the second count.

The petitioner, an attorney (R. 86, 883) had rendered legal services to Berkeley Jewelers, Inc. (R. 86, 87, 201-202, 891-894). During the years 1948 and 1949, Albert B. Faskow, the president and sole stockholder of Berkeley Jewelers, Inc. (R. 80) sought petitioner's help in securing loans for the corporation (R. 87, 96-97, 113). In addition to any loans which the petitioner helped the corporation to secure, the corporation borrowed other substantial sums from sources in which transactions the petitioner did not participate (R. 260, 264-269, 277-280). Among the loans negotiated by the petitioner for that corporation, were several that were made by a Jack Fellerman and Sam Mintz, as joint lenders (the latter two being named as co-conspirators but not indicted under the third count of the indictment) which loans totalled $4000. (R. 97, 101, 560-562) and were made in the fall of 1948 (R. 96, 101,

557, 561). The petitioner personally guaranteed the repayment of those loans totalling $4000. (R. 97, 104-105, 557-559, 562, 575, 583). Those loans of $4000. were never repaid (R. 107, 562-563, 577) so that Fellerman and Mintz were bona fide creditors of Berkeley Jewelers, Inc.

Thereafter four confessions of judgment, each in the sum of $1,000. were executed by Berkeley Jewelers, Inc. in favor of Jack Fellerman (R. 146, 158, 606-608, Defendant's Exhibit R). Those confessions of judgment were dated December 15, 1949. The Government attempted to establish that those confessions of judgment were executed in January, 1950, through the testimony of Mr. Faskow (R. 145-146, 152, 155, 300-301) yet Mr. Mintz, a government witness testified that there was a lapse of at least a month between the date of the execution and delivery of those confessions of judgment and the entry of judgments thereon (R. 585) and that he had agreed to wait a month before taking action on them (R. 585). The testimony of Mr. Mintz on that point is of importance since the defense contended that the execution of those confessions of judgment were executed and delivered solely for the purpose of placating that creditor to obtain from them a month's grace during which time the corporation would attempt to obtain funds with which to pay off the indebtedness (R. 930-935) since Mr. Faskow was carrying on negotiations with a Mr. Shapiro for a partner who was to make a substantial investment in the business of the corporation (R. 296-298, 930-935), and had nothing to do with any conspiracy.

Thereafter judgments were entered on the confessions by an attorney, Benjamin H. Chasin, in the Municipal Court of the City of New York, Second District, Borough of Manhattan (R. 608), executions were issued thereon (R. 608, 613) and a Marshal of New York City levied upon the property of Berkeley Jewelers, Inc. pursuant to such executions (R. 609, 613, 617), notices of sale were posted con-

spicuously by the Marshal in three places according to law (R. 617-618) with a sale date of January 28, 1950. A custodian was placed in the premises (R. 759) at the instructions to Mr. Fellerman by his attorney (R. 609). The sale by the Marshal was held on January 28, 1950 (R. 621). All of those acts commencing with the confessions of judgment through the Marshal's sale were lawful acts performed in conformance with the statutes of the State of New York.

At the sale, the only bidder was Mr. Mintz (R. 572). The merchandise was sold for $1200. (R. 627) and the right, title and interest of the judgment debtor in the fixtures, subject to a chattel mortgage, were sold for $100. which together with sales tax brought a total of $1326 (R. 628). The Government made a big issue of the sales price of $1300., referring to it as a rigged sale, but it may be pointed out that the amounts of the judgment and the expenses of the custodian, Marshal's fees and expenses of the sale exceeded $4500. and the only effect of the sale price being $1300. up to $4500 or so would be the amount of the Marshal's fees and the fees of the attorney for the judgment creditor for the reason that the proceeds of the sale, less those fees would eventually revert to the judgment creditor anyway.

Mr. Faskow and Mr. Shulman, who were not present at the sale (R. 166, 477), testified that it was a part of the alleged conspiracy that the bill of sale would be made out in the name of Irving Shear (R. 149, 473) yet Mr. Mintz, the actual purchaser, testified that that question first arose when the Marshal inquired as to the name of the purchaser to record same on the bill of sale *after* the sale occurred (R. 572).

The third count finally charges that the assets would be transferred to Berkeley Pennsylvania Corporation. The testimony offered by the Government fell far short of that allegation. Mr. Faskow testified that the sale merchan-

dise was to be used to repay the loans to Fellerman and Mintz and Bucknell Trading Corp., another bona fide creditor (R. 146, 147, 157, 158) and that only the balance, if any, would go to Berkeley Pennsylvania Corporation (R. 146, 147, 148) and that his stake in permitting the transaction was that he would be "guaranteed a job in this new corporation" (R. 148). Mr. Shulman, testified at page 473 of the record when questioned by the Trial Court that Bucknell Trading Corp. and Mintz (co-lender with Fellerman) were to be the beneficiaries of the sale merchandise without ever mentioning Berkeley Pennsylvania Corporation. It is significant to note that, in addition to the $4000. owed to Fellerman and Mintz, Berkeley Jewelers, Inc. owed about $20,000. to Bucknell Trading Corp. (R. 321, 337) so that there was no probability of anything remaining to be transferred to Berkeley Jewelers, Inc., the proposed beneficiary of the conspiracy under the third count. That merchandise was appraised by the Government's expert witness, the appraiser appointed by the District Court in the eventual bankruptcy proceedings, at $18,766.50 (R. 892) and the eventual sales price of the merchandise, which was turned over to the Trustee under a stipulation in the bankruptcy proceedings (R. 796, Defandant's Exhibit GG), was $10,000. (R. 856). The petitioner was one of the prime movers in obtaining the execution of that stipulation under which possession of the merchandise sold at the Marshal's sale was turned over to the Trustee (R.794, 955-957, 958-959, 973-975, Defendant's Exhibit GG).

The third and fourth alleged co-conspirators, Fellerman and Mintz, gave no testimony whatsoever about any proposed transfer to Berkeley Pennsylvania Corporation. The fifth alleged co-conspirator, Mr. Shear, testified that he did not even come to New York until after the sale was held (R. 667-668). It is worthy of note that both Faskow and Shear testified that none of the merchandise was in fact used by the new corporation (R. 180, 676, 700).

In its charge to the jury, the Trial Court did not instruct the jury that it must find that the object of the conspiracy was that the property of Berkeley Jewelers, Inc. would be transferred to Berkeley Pennsylvania Corporation, as charged in the third count, in order to find the defendant guilty of the crime charged therein. Nor did the Trial Court give any definition or give any legal criteria as a guide to the jury in the determination of the meaning of the word "fraudulently" which the Sixth subdivision of Section 152, Title 18, U. S. Code prescribes as a prerequisite of that crime.

Although the conspiracy alleged in the third count is the transfer of property to Berkeley Pennsylvania Corporation and the Government conceded at the trial, in the course of argument on a preliminary motion, that the third count did not allege a concealment or a conspiracy therefor, and that it did not propose to offer any such evidence (R. 17-18), the Government adduced a vast amount of testimony of an alleged independent crime, that of the withdrawal and concealment of certain lots of merchandise before the Marshal's sale (R. 167-168, 475-478, 945, 1280) and its eventual disposal by private sale with the proceeds being used in liquidation of the indebtedness of Berkeley Jewelers, Inc. to Bucknell Trading Corp., a bona fide creditor (R. 482, 529-530) which the defense contended was merchandise pledged to Bucknell Trading Corp. under trust receipt transactions and which that entity did what it had the right to do under the Uniform Trust Receipt Laws of the State of New York (R. 319, 378, 431, 466, 510-511, 943, 945, 1280). No testimony was offered to prove that any of that merchandise was to be transferred to Berkeley Pennsylvania Corp. Prior to the trial, the defendant was not apprised of the nature of that alleged independent crime and did not know that he would be called upon to defend himself against that charge at the trial.

In its charge to the jury, the Trial Court gave a commentary of the evidence under the third count and in that commentary it referred to the alleged independent crime as being a component part of the crime charged (R. 1403-1405). The Trial Court did not charge the jury that proof of the alleged independent crime was not to be considered as proof of the crime charged in the third count. Even if that proof of the alleged independent crime were admissible for the purpose of showing intent, the charge to the jury failed to limit that proof to that element of the crime charged. The Trial Court gave a one-sided review of the testimony under the third count. It failed to even discuss the defense contention that the acts alleged from the execution of the confessions of judgment through the Marshal's sale were lawful acts under the statutes of the State of New York and which acts could be considered fraudulent to support the third count. Likewise, the Trial Court failed to even discuss the defense contention that the merchandise taken by Bucknell Trading Corp., the alleged independent crime, was lawfully taken under the Uniform Trust Receipts Law in the Personal Property Law of the State of New York.

The second count of the indictment charged the petitioner with the crime of knowingly and fraudulently concealing assets from the Trustee in Bankruptcy. During the pendency of the bankruptcy proceedings, a Trustee was elected by the creditors whose appointment was approved by the Referee in Bankruptcy (R. 72-73, Government's Exhibit 1D), although the Government never proved that the Trustee qualified by the posting of a bond as required by Section 78 (b), Title 11, U. S. Code or that he notified the Referee in Bankruptcy of his acceptance pursuant to General Order 16.

The undisputed facts under the second count were that the petitioner was a member of the bar (R. 86, 883) and that he was co-counsel for the bankrupt (R. 76, 776); that

the Trustee abandoned the fixtures formerly owned by the bankrupt that were subject to a chattel mortgage because he felt that there was no equity above the mortgage (R. 777); that the Trustee never took possession of the premises formerly occupied by the bankrupt (R. 777-779); that the landlord of the premises requested the removal of the fixtures from the premises and sought possession of the premises (R. 779, 1008-1009); that the attorneys for the Trustee gave the petitioner permission to enter upon the premises to provide for the removal of the fixtures (R. 778-779); that upon entering the premises and examining the safe therein, some merchandise was found in the safe (R. 880, 881, 1011), Government's Exhibits 19A, 19B, 19C); that the merchandise consisted of several hundred cheap, miscellaneous jewelry items which were appraised by the Government's own expert witness at only $250 (R. 826). (In this connection, it is significant that although the Government produced all other exhibits at the argument of the appeal before the Court of Appeals, the Government refrained from producing those jewelry items at the argument for the Court of Appeals to observe the subject of that alleged concealment); that the petitioner removed the merchandise from the safe (R. 772) and took same to his office (R. 1012); that a telephone conversation took place between the petitioner and the office of the attorneys for the Trustee during which conversation that merchandise taken from the safe was discussed in which the petitioner agreed to write a letter to the attorneys for the Trustee in which an inventory of that merchandise would be given after which the attorneys for the Trustee would give the petitioner instructions for the disposition of that merchandise (R. 1012-1013); that the petitioner had typed out such letter (R. 807, 1013, Government's Exhibit 20); that after the typing of that letter but before it was mailed, two agents from the Federal Bureau of Investigation came to the petitioner's office with a warrant of arrest of the petitioner (R. 806); that a conversation took place between the petitioner and the

agents, during which the petitioner exhibited the letter addressed to the attorneys for the Trustee (R. 807), and a copy of that letter was given to the agents (R. 807, 1017); that the petitioner gave the merchandise removed from the safe to the agents (R. 808); that the petitioner was arrested by the agents (R. 806); that after the arrest, the petitioner was taken to the office of the United States Attorney for the Southern District of New York at which office the petitioner made a statement of the facts concerning the details of the crime charged; that neither the agents nor the Assistant United States Attorney ever informed the attorneys for the Trustee about that letter (R. 785-786); that the attorneys for the Trustee never heard about that letter and never saw that letter until shown to one of such attorneys upon cross-examination at the trial; and that the original of that letter was impounded by the Grand Jury (R. 1018).

In order to establish his innocence of the crime charged at the trial under the second count, the petitioner testified that after the telephone conversation with the office of the attorneys for the Trustee in which he was granted permission to enter the premises and arrange for the removal of the fixtures abandoned by the Trustee and to have the landlord obtain possession of the premises, he communicated with the mortgagee of the fixtures (R. 1009) and arranged for a meeting with the mortgagee at the premises (R. 1010); that the mortgagee and several other people met him at the premises (R. 1010) which was about the middle of the month of May, 1950; that after the safe was opened and the merchandise was discovered, the petitioner stated to those present that he was taking the merchandise for safekeeping and would turn same over to the Trustee (R. 1012); that after returning to his office with the merchandise removed from the safe, petitioner telephoned the office of the attorneys for the trustee and informed that office of the discovery of the jewelry items in the safe and that he was requested by

the attorneys for the trustee to write them a letter giving the inventory and was informed that after the receipt of the letter, the attorneys for the trustee would give the petitioner instructions for the disposition of the merchandise (R. 1012-1013); that the petitioner agreed to write such letter (R. 1013); that thereafter the petitioner did have such letter typed (R. 1013); that the petitioner placed that letter in his pocket for the purpose of mailing same on May 29, 1950, but did not immediately mail it because he inadvertently wrote something on the envelope after taking same from his office (R. 1013); that the following day was a legal holiday for which reason the petitioner did not return to his office to type out a new envelope (R. 1014); that on May 31, 1950, after the agents of the Federal Bureau of Investigation came to his office, the petitioner took that original letter enclosed in the soiled envelope from his pocket in the presence of the agents (R. 1016); and that all of the aforesaid facts were included in the statement made by the petitioner to the Assistant United States Attorney after his arrest.

In dispute of some of that testimony of the petitioner, the Government offered the testimony of two witnesses, Carl Johansen, the elevator operator of the building, and Joseph H. Frier, one of the attorneys for the Trustee. Mr. Johansen testified that the incident occurred sometime in the month of May, 1950 (R. 772); that nobody entered the premises before the visit of the petitioner (R. 773-774); that the only other person that came into the premises was a lighting fixture man, who came *after* petitioner's visit (R. 774); that when the petitioner was in the premises, nobody other than himself was present (R. 774); that he could not identify what the petitioner removed from the safe since he was "20, 25 feet away" from petitioner at the time (R. 772); and that all that he observed was that petitioner removed something from the safe which the petitioner took with him when he left the building (R. 772).

After the trial, petitioner discovered for the first time that Mr. Johansen had testified before the Referee in Bankruptcy in the 21a examination in the bankruptcy proceedings on July 24, 1950, about two months after the occurrence whereas the trial took place about six years later (R. 1588). It is uncontrovertible that the recollection of a witness would be greater two months after the occurrence of the incident rather than six years later, the time of trial. At the 21a examination, Mr. Johansen testified that the incident occurred during the middle of May, 1950, (R. 1588, 1591); that other people came to the premises before the petitioner and that "they opened it (the safe)" (R. 1588, 1591); that as the safe was closed, the petitioner came to the premises (R. 1588); that he observed the merchandise in the safe prior to petitioner's arrival (R. 1588); that the petitioner removed two boxes (trays), one of which had a leather cover and which trays were an inch deep, twelve inches long and six inches wide (R. 1589).

In its charge to the jury, the Trial Court added to Mr. Johansen's testimony by attributing to him testimony that Mr. Johansen "saw him (the defendant) take something out and put it under his coat" (R. 1400), despite the fact that the month of May is not a month during which men wear coats. The Trial Court in its decision denying the motion in arrest of judgment and for a new trial upon the ground of newly discovered evidence stated that whether Mr. Johansen had testified that the petitioner placed what he had removed under his coat was "crucial to Switzer's present claim" (R. 1615) and went so far as to hold a hearing at which the Court Reporter was called upon to testify whether his stenographic notes contained such testimony (R. 1615) since such an act would indicate surreptitiousness. The fact that the Trial Court gave the force of such testimony to an eye-witness would have the same effect on the jury as though such witness had given such direct testimony.

The main serious ground upon which the Government opposed the motion in arrest of judgment and for a new trial was that such newly discovered evidence merely attacked the credibility of the witness and that such newly discovered evidence was available to the defendant at the time of trial. Such newly discovered evidence altered the very facts upon which the jury predicated its verdict of guilt and indicated that the trial testimony was mistaken if not false. Certainly any evidence that would render the trial testimony mistaken or false testimony would affect the credibility of the trial witness. The contention of the Government concerning the availability of the newly discovered evidence is untenable when it can be seen that such evidence was at least equally available to the Government with its greater resources for investigation and it is impossible to believe that the Government would withhold such contradictory testimony from the Trial Court if such were in the Government's possession.

The Trial Court, in its opinion in which it denied the motion stated that it does "not believe that he (petitioner) first learned of Johansen's prior testimony only after the trial" (R. 1617). It is inconceivable that an attorney on trial for a crime who had knowledge at the trial of such contradictory testimony of a vital government witness would not make use of it at the trial.

The other government witness that disputed some of the testimony of the petitioner was Mr. Frier, one of the attorneys for the trustee. He testified that after he learned of the removal of the merchandise by the petitioner from the safe, he telephoned the petitioner and inquired about that fact to which the petitioner denied having taken anything (R. 779-780); that he telephoned the petitioner a second time and informed the petitioner that after making another check, he was informed that the petitioner had removed three or four trays from the safe to which the petitioner ~~denied~~ admitted taking the merchandise but claimed

that they were of no consequential value and that the petitioner would write him a letter explaining the situation but that he never received any letter from the petitioner (R. 780-781). It is apparent that Mr. Frier's testimony was colored by the fact that the agents and the Assistant United States Attorney never told him about the letter which was in fact typed out and Mr. Frier harbored the thought for six years that the petitioner never wrote the letter which was promised and presumably that his memory was dimmed by the passage of that great length of time.

Mr. Frier's testimony was a complete surprise to the petitioner when given at the trial for he had no way of anticipating such testimony for which reason he was at a loss to combat that testimony other than deny same at the trial. After the trial and during the pendency of the appeal before the Court of Appeals, while going through the files, the petitioner came across a letter that was sent to him by the firm of Goldman & Frier, the attorneys for the trustee, the import of which first became apparent after hearing Mr. Frier's testimony and to which such significance could not have attached in the preparation for the trial and prior to hearing that testimony. That letter not only indicated that Mr. Frier was mistaken about the conversations and that he was confusing the demand for the merchandise removed from the safe with the merchandise sold at the Marshal's sale and the possession of which was to be turned over to the Trustee under the said stipulation but also that Mr. Frier did not even handle the case during the month of May, 1950. That letter also throws a new light upon certain testimony given at the trial by him. Mr. Frier testified at the trial with positiveness that he knew that he could not have spoken to the petitioner about the stipulation up to May 5, 1950, the date of the execution of that stipulation since a Mr. Jasie and not he had charge of the case (R. 796, 797). That letter clearly indicated that on June 13, 1950,

which date was after the arrest itself, Mr. Frier still was not handling the case and that Mr. Jasie was still in charge of the case (R. 1596). If Mr. Frier was positive that he did not have any conversation with the petitioner up to May 5, 1950, the date of the execution of the stipulation, when a vital matter of the estate was consummated involving many thousands of dollars worth of merchandise, because he was not handling the case and Mr. Jasie was in charge of it, then it indicates the probability that he did not hold the conversations with the petitioner during the month of May, 1950, since Mr. Jasie was still in charge of the case on June 13, 1950. At least it opens the door for further cross-examination to ascertain the date that Mr. Frier did commence handling the case. It seems ludicrous to believe that the petitioner would attempt to conceal property of the value of only $250, when the testimony of the witness Shear, an alleged co-conspirator, testified that none of the Marshal's sale merchandise was to be used and that he was so instructed by the petitioner and that Mr. Faskow, another alleged co-conspirator, also testified that none of the Marshal's sale merchandise was used (R. 180) and the Marshal's sale merchandise amounted to over $18,500, in value according to the Government's expert witness, the appraiser appointed by the District Court.

The Trial Court, in its decision on said motion, misinterpreted the import of that letter as indicated by its comment that the letter "relates only to matter involved in the third count" (R. 1616). True, that letter relates to the merchandise involved in the third count but that is the very point raised by the petitioner that Mr. Frier's office confused the merchandise referred to in that letter with the safe merchandise.

Near the close of the case, the Trial Court excused the jury and summoned counsel for both sides to the robing room behind the courtroom (R. 1287). The defendant was

not called into that robing room and remained in the courtroom proper. While in the robing room, the Trial Court ruled on the various requests to charge submitted by counsel (Res. App. 274a-277a). There was some argument on several of the requests (Res. App. 276a) and defense Counsel took exception to some rulings (Res. App. 275a). Thereafter Defense Counsel made several motions for the dismissal of the two counts of the indictment involved (R. 1291-1293), upon which motions the Trial Court ruled (R. 1292-1293) to which rulings Defense Counsel excepted (R. 1292). Respondent's appendix includes the matter of the requests to charge but does not include any of the proceedings conducted in the robing room in connection with the motions to dismiss. The Court of Appeals in its opinion omits any reference to the matter of those motions. Apparently the Court of Appeals was under the impression that Respondent's Appendix contained the entire history of what occurred in the robing room. Petitioner was not asked whether he waived the right to be present at that stage of the trial nor was his presence in fact waived.

The deprivation of his right to be present at every stage of the proceedings resulted in substantial prejudice which will be pointed out in REASONS RELIED ON in this petition.

During the course of the trial, the Trial Court adopted the role of prosecutor by excessively conducting the examination of witnesses on both direct and cross-examination, including the petitioner. By actual count, the Trial Court asked the various witnesses at least 920 questions. The reason that the petitioner states "at least" is that in many instances, the Court Reporter did not quite make clear where the Trial Court stopped its questioning and where the respective trial counsel carried on. In that tabulation, the count was restricted to questions unmistakably propounded by the Trial Court. In the petitioner's brief to the Court of Appeals, he enumerated

the pages of the record where the questions were unmistakably asked by the Trial Court. That enumeration and designation was not contested by the Government either in its answering brief or upon the argument. The opinion of the Court of Appeals accepted the petitioner's statement as fact (Pet. App. D). An excellent example of that cross-examination of the petitioner appears on pages 1188 and 1189 of the record where the Trial Court asked for the statement given to the Assistant United States Attorney by petitioner after the arrest and read questions and answers from that statement and questioned the petitioner as to the truth or falsity of the answers therein given as well as to the truth or falsity of answers given by petitioner at the trial.

In one instance, during the direct examination of petitioner, a question asked petitioner by his counsel went unchallenged by the Government. The Trial Court interrupted the examination and demanded of counsel that he develop the statement given in answer to the question that went unchallenged, then the Trial Court took over the examination of petitioner and asked questions, thirteen in number, in an attempt to disprove the answer given by petitioner (R. 1005-1007) and then admonished Defense Counsel not to ask questions of such nature (R. 1007).

Furthermore, the Trial Court's cross-examination of petitioner indicated in many instances that the Trial Court disbelieved the petitioner's testimony and must have given that impression to the jury. Typical examples, but by no means all-inclusive, appear on pages 1111, 1144, 1147, 1153, 1169, 1187 and 1207 of the record.

A reading of the record during the later stages of the trial, while petitioner was on the witness stand during cross-examination, will clearly reveal that the Trial Court repeatedly rebuked the petitioner and his Trial Counsel unnecessarily and in a manner which must have prejudicially affected the jury. The Trial Court not only referred

in its charge to the rebukes of petitioner (Res. App. 291a), but even indicated itself that its action may have prejudicially affected the jury by cautioning the jury during the examination of petitioner that its rebukes did not affect the innocence or guilt of the petitioner. One of such instances appears on pages 1181-1182 of the record. The Government, in its answering brief in the Court of Appeals, sets forth 27 instances where the Trial Court admonished the petitioner. Those admonishments or rebukes were administered because the petitioner attempted to give explanations of answers to double questions propounded by the Government or by the Trial Court on cross-examination such as "Did you testify falsely then or are you testifying falsely now?". The reference to pages 1188 and 1189 of the record was an example where the Trial Court itself asked such double questions. The Trial Court on many occasions rebuked Defense Counsel unnecessarily.

There were other instances of prejudicial error committed by the Trial Court. While the jury was deliberating, it sent a letter to the Trial Court requesting the indictment itself and an exhibit (Res. App. 310a). The Trial Court forwarded the indictment and the exhibit to the jury room without any instructions whatever to the jury (Res. App. 310a). That indictment contained the first count directed solely to a co-defendant, not on trial, in which he was charged with the crime of using the mails to defraud. Under such circumstances, the Trial Court should have at least cautioned the jury not to read count one or, in any event, that it was not a crime charged against the petitioner.

The Trial Court further committed prejudicial error in excluding from evidence the document containing the statement given by petitioner to the Assistant United States Attorney after the arrest (R. 1278-1279) under the "Completeness Doctrine" after Government counsel

"opened the door" by using portions of that statement on cross-examination.

The Trial Court further committed prejudicial error by permitting the prosecuting attorney to read to the jury extracts from the Grand Jury minutes (R. 1356-1359) which were not in evidence. A stipulation was entered into the record to the effect that if the Grand Jury stenographer were called as a witness, he would testify that the extracts of the Grand Jury minutes read to the petitioner on cross-examination was a true and accurate transcription of the actual testimony given by petitioner to the Grand Jury (Res. App. 273a-274a). However, that is only a prelude to the offering of those extracts into evidence. But the Government never did offer those extracts into evidence (Res. App. 274a). Not being in evidence, the prosecuting attorney had no right to read them to the jury, particularly when in some instances, the petitioner testified that he did not recall being asked such question or giving such answer approximately four years earlier.

On Tuesday, April 17, 1956, the third to last day of the trial, the Trial Court received a special delivery, registered letter from a Mr. Shapiro, a person often mentioned during the trial, and who was under subpoena served upon him in the City of New York to appear as a defense witness on April 17, 1956. That letter merely contained a certificate from a physician in Boston in which it stated that the proposed witness was under his care for an acute attack of inflamed hemorrhoids and that such prospective witness would be unable to leave Boston until the end of that week. Defense Counsel explained the value of that prospective witness to the defense. The Trial Court again acted as prosecutor and argued against a delay in the completion of the trial to permit that witness to return to New York and testify, instead of permitting the prosecuting attorney to advance

argument and preserving the Trial Court's judicial position. It seems that the Trial Court was more interested in speedily completing the trial than the presentation of that vital proposed testimony to the jury to help it in arriving at a just verdict. The Trial Court's persistence in refusing to arrange for a continuance of the trial until the return of Mr. Shapiro to New York was prejudicial to the petitioner. That incident appears in the record at pages 1054-1066.

During the course of the trial, Defense Counsel requested the Trial Court's permission to permit the petitioner to leave the courtroom to go to the bathroom during a lull in the trial while the jury was examining exhibits. The Trial Court granted that permission but before the return of the petitioner to the courtroom directed that the trial proceed with the taking of testimony. Defense Counsel urged the Trial Court to await the petitioner's return. The Trial Court asked Defense Counsel whether he insisted upon the return of the petitioner or could the trial proceed. When Defense Counsel stated that he did not insist on anything, the Trial Court ordered the trial to proceed and testimony was taken during the petitioner's absence. At no time did Defense Counsel affirmatively waive the necessity of the petitioner's presence. That incident appears in Respondent's Appendix at pages 52a-53a. The testimony taken was that of the chief government witness in which he testified that he told the petitioner of the corporation's financial condition during the month of December, 1949. A reading of the record fails to disclose that the same testimony was given during any other portion of the trial. Deprivation of the petitioner's right to hear that testimony was prejudicial to him.

Another instance of prejudicial error on the part of the Trial Court was its decision to overrule a defense objection (Res. App. 88a) to a line of questioning in

which five Government witnesses testified to conclusions that they testified falsely before the Referee in Bankruptcy or the Grand Jury without particularizing the precise answers that were false (Res. App. 88a, 111a, 134a, 195a, 143a). In the case of the witness, Fellerman, such conclusions were in response to questioning by the Trial Court and without any preliminary testimony that there was a previous conversation with petitioner (Res. App. 143a).

The District Court had jurisdiction under Title 18, U. S. Code, Section 152, first subdivision under count two and under Title 18, U. S. Code, Section 371, 152, sixth subdivision under count three.

The trial resulted in a verdict of guilty against petitioner on the second and third counts of the indictment (Res. App. 310a). The petitioner was sentenced to one year and six months on the second count, with execution of sentence suspended, with three years probation to run after the completion of sentence on the third count and to one year and six months on the third count (R. 1461-1462). Upon appeal the judgment of the District Court and its denial of a motion in arrest of judgment and for a new trial in the "interest of justice" upon the ground of newly discovered evidence was affirmed by the Court below (Pet. App. A). A timely application for rehearing was denied by the Court below.

(F) Reasons Relied On

As to Question 1:

This question concerns the portion of the trial conducted in the robing room and not in the courtroom, in the absence of the petitioner and while he was in the courtroom, without any waiver on his part to be present at

every stage of the trial and the portion of the trial at which the Trial Court directed the taking of testimony during a permitted absence of the petitioner from the courtroom and while he was in the bathroom.

Two phases of the trial took place in the portion of the trial conducted in the robing room. The first concerned the argument on requests to charge, the rulings on those requests, and exceptions taken to rulings. The second was the motions to dismiss, the rulings on those motions and exceptions taken to the rulings.

The Fifth Amendment to the Constitution of the United States provides, among other things,

> "No person shall * * * be deprived of life, liberty or property, without due process of law; * * *."

Rule 43 of the Federal Rules of Criminal Procedure, Title 18, U. S. Code, specifically provides that the defendant shall be present at every stage of the trial unless he voluntarily absents himself. In the case at bar, the defendant was in the courtroom so that the portion of the trial conducted in the robing room could have been held in the courtroom or the defendant could have been called into the robing room. The defendant did not waive his presence at that stage of the trial and in fact was not even asked whether he waived such appearance.

This Court, in reversing a judgment of conviction, in *Shields* v. *United States*, 273 U. S. 583, 47 S. Ct. 478, 71 L. Ed. 787, said at page 588,

> "The request made to the Court jointly by the counsel for the defendant and for the government did not justify exception to the rule of orderly conduct of jury trial entitling the defendant, especially in a criminal case, to be present from the time the jury is impaneled until its discharge after rendering the

verdict. We reverse the judgment without reference to the other causes of error assigned."

In *Ah Fook Chang* v. *United States*, 91 F. 2d 805, the Circuit Court of Appeals, Ninth Circuit, reversed the judgment of conviction on two grounds. The first was that, while the jury was still deliberating, the foreman of the jury came to the chambers of the Presiding Judge *and in the presence of Trial Counsel for the defendant* and the Government requested additional instructions which were given by the Trial Court *in the presence of Defense Counsel*. The second was that the Trial Court communicated with the jury in the absence of both the defendant and his attorney. The facts of the first ground of reversal are set forth in full in the opinion of the *Ah Fook Chang* case at page 808 of that opinion from which it can be readily seen that Defense Counsel was present at the time. In fact, the incident did not appear in the record and was submitted to the Court of Appeals upon affidavit of Defense Counsel as to what had occurred. After that recital of facts at page 808, the Court of Appeals, Ninth Circuit, said at page 809,

> "We believe the action of the trial court was reversible error on two grounds.
>
> The first is that appellants were entitled to be personally present at every stage of the trial. * * * But a trial is supposed to take place in a courtroom, and here even if appellants had been in the courtroom, the proceeding would not have taken place in their presence, for it took place in the judge's chambers. If appellants had absented themselves from the courtroom voluntarily, they would have thus consented to the proceeding in the courtroom, but not at some other place. Cf. Shields v. United States, 273 U. S. 583, 587, 47 S. Ct. 478, 479, 71 L. Ed. 787."

In the instant case, the Court of Appeals stated in its opinion that the *Shields* and *Ah Fook Chang* cases did not apply since "in those cases the court gave additional instructions to the jury after it retired and out of the presence of the defendant and his counsel." It is apparent that the Court of Appeals [illegible] referred to the second ground of reversal in the *Ah Fook Chang* case and completely overlooked the first ground therein cited which took place *in the presence of Defense Counsel in the Judge's chambers.*

In touching upon the portion of the trial that occurred in the robing room, the Court of Appeals referred only to that part of the trial which concerned the matter of requests to charge and overlooked entirely the motions to dismiss, arguments of counsel, rulings on the motions, and exceptions taken thereto. This oversight may be due to the fact that in the Government's appendix submitted on that appeal, the Government only included the matter of requests to charge (Res. App. 274a-277a) but omitted completely the motions to dismiss, arguments thereon, the rulings thereon and the exceptions taken (R1291-1293). In referring only to the matter of the requests to charge, the Court of Appeals attempted to justify the Trial's Court error by stating that "Rule 30 of the Federal Rules of Criminal Procedure, which provides that parties may file written requests for instructions and that the court shall inform counsel of its proposed action on the requests, does not require the court to inform a defendant represented by counsel of its rulings. Nor does it require that the defendant be present while requests are made".

That justification of the Trial Court's procedure could not apply to the motions to dismiss, the arguments thereon, the rulings on those motions, and the exceptions taken thereto, since that Rule 30 only concerns itself with the matter of requests for instructions and not to anything

else. Furthermore, Rule 30 does not vitiate the requirement of Rule 43 that the defendant be present at every stage of the trial. It merely provides that the objections and the grounds of objections be made "out of the hearing of the jury". Nothing is stated in that rule that anything about the requests for instructions be made *out of the hearing of the defendant*. The fact that Rule 30 provides that the Court shall inform *counsel* of its proposed action upon the requests should not be taken as authorization to exclude the defendant from that portion of the trial. By indirection, the Court of Appeals has thus ruled that argument on the requests for instructions, the rulings of the Trial Court, the objections to those rulings and the grounds of such objections are not a part of the trial. If such were the case, that principle could apply with equal force to every motion made at a trial, to every ruling on such motions, to every objection taken at the trial and to every ruling on such objections since they likewise are direct colloquies between the Trial Court and counsel, without the defendant taking active part. Such a principle would likewise conflict with the principle laid down in the *Shields* and *Ah Fook Chung* cases since those cases concerned instructions to the jury in which the defendant takes no active part personally. This very Court has held that a "trial" connotes decisions on the evidence and arguments thereon advanced in open court as well the actual testimony. In *Bridges v. State of California*, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192, this Court held at page 271,

> "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court."

Congress itself, in its table of contents to the Federal Rules of Criminal Procedure, under Chapter VI, designated Rules 23-31, which includes Rule 30, as being applicable to the "Trial".

Furthermore, the jury was present after the Trial Court completed its charge and to make additional requests to charge at that point of the trial with possible resulting objections in the hearing of the jury would be violative of that Rule 30 itself.

On the question of prejudice to the defendant in conducting a portion of the trial in the robing room in the absence of petitioner and without his waiver of the right to be present at that stage of the trial, the Court of Appeals in the case at bar stated "Moreover this defendant certainly was not prejudiced, because he had an opportunity to propose, and did propose, additional instructions later in open court." Firstly, the Court of Appeals was in error when it stated that additional instructions were proposed later in open court for Defense Counsel merely pointed out to the Trial Court that it had omitted to give the jury instructions on one of the requests that the Trial Court had favorably ruled upon (R. 1416). Furthermore, the Court of Appeals for the Second Circuit itself had ruled in other cases that the making of requests for instructions after the Trial Court instructed the jury would be untimely and that the Trial Court may refuse to consider them at that time. In *Darger* v. *United States*, 17 F. 2d 696, the Second Circuit said at page 697,

> "The omnibus request last above quoted * * * was also too late under the rules of the trial court, having been tendered after the close of the colloquial charge."

and in *La Fountain* v. *United States*, 14 F. 2d 562, that Court stated at page 563,

> "We fully approve the action of the trial judge in declining to consider seventy-three written requests to charge tendered to him for the first time only after his charge had been delivered and the exceptions therein noted."

Other circuits have likewise held that requests for instructions made after the charge were untimely. In *Lewis* v. *United States*, 8 Cir., 153 F. 2d 724, the Court of Appeals held at page 726,

> "The request was untimely, coming, as it did, after the court had completed its charge."

In *Affronti* v. *United States*, 8 Cir., 145 F. 2d 3, 9, the Court of Appeals went so far as to hold that a request to charge made after the charge had been completed amounted to nothing more than an objection to the charge.

Secondly, the petitioner was deprived of his right to direct his counsel's attention to the making of various preliminary motions prior to the motions to dismiss and to asking the Trial Court to take judicial notice of certain New York State statutes in connection with the lawful procedures of the confessions of judgment, entry of judgment thereon, execution to the Marshal, levy by the Marshal, the sale by the Marshal, and the relevant provisions of the Uniform Trust Receipt Law under the Personal Property Law of the State of New York referred to in the STATEMENT OF CASE as well as additional requests for instructions to the jury. It must be borne in mind that petitioner was an attorney. It can be presumed that he had some familiarity with legal principles. Under such circumstances he was in the position of calling to his counsel's attention some very serious oversights by counsel.

It has been pointed out under STATEMENT OF CASE that testimony was introduced of an alleged independent crime. Trial Counsel overlooked moving the Trial Court to strike out all of such testimony of the alleged independent crime upon the ground that such crime was not alleged in the third count. Had that motion been granted, it was the intention of the petitioner to then request counsel to move

for a mistrial upon the ground that the jury, having heard such testimony, could not erase such testimony from its mind. Both of those motions would have appropriately been made immediately prior to the motions to dismiss which were made in the robing room in the absence of the defendant. Had either or both of those motions been denied by the Trial Court, upon a ruling that such testimony was admissible to show intent or absence of mistake, it would then have been appropriate to request instructions that the Jury was not to consider such evidence as proof of the crime charged in the third count but was to be restricted to proof of intent or absence of mistake.

Defense Counsel, besides overlooking the matter of requesting the Trial Court to take judicial notice of the said New York State Statutes, also overlooked making any requests to charge that the acts concerning the confessions of judgment were lawful procedures under such statutes and for the Trial Court to instruct the jury what it was necessary for the Government to prove to make out a conspiracy to *fraudulently* transfer the property. In connection with the alleged independent crime, if it was to be considered as proof of intent, Defense Counsel overlooked requesting instructions to the jury that if the jury was to determine that the merchandise taken out and sold and the proceeds going to Bucknell Trading Corp. in liquidation of the indebtedness due it from Berkeley Jewelers, Inc., was lawfully taken out under pledges of trust receipt transactions in accordance with the Statutes of New York State, then such acts did not constitute a crime and the jury then should not even consider such proof of the alleged independent crime as proof of intent or absence of mistake.

Thus we find affirmatively that there was prejudice to the petitioner by conducting that portion of the trial in the robing room in his absence. This Court has held that

if the record affirmatively shows that a defendant was prejudiced, there is reversible error. *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 39 S. Ct. 435, 63 L. Ed. 853. The Court of Appeals, Tenth Circuit, held that if the record fails to show affirmatively that no prejudice did result, the verdict cannot stand. By stating in *Little* v. *United States*, 73 F. 2d 861, at page 867,

> "The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

In the *Ah Fook Chang* case, supra, the Ninth Circuit Court of Appeals held that if the record does not disclose whether or not prejudice resulted, it is to be presumed to be prejudicial and to require reversal, by saying at page 810,

> "Finally if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal."

The same principles of law are applicable to the incident during the trial referred to in STATEMENT OF CASE at which Defense Counsel requested permission of the Trial Court for the petitioner to go to the bathroom for a few minutes and then directing that the taking of testimony proceed before his return to the courtroom. The Court of Appeals held that there was no irregularity here for the defendant was absent at his own request and the Judge continued after obtaining express permission from defense counsel (Pet. App. D). A reading of the record at that point will indicate that the Court of Appeals was in error in ruling that there was express permission of Defense Counsel. Defense Counsel merely stated that he did not insist on anything when asked by the Trial Court whether he insisted on awaiting the defendant's return to the courtroom or whether the trial could proceed. Further, requesting

permission to be excused for a few minutes during a lull in the trial cannot be considered as consent for the taking of testimony in the defendant's absence. Prejudice resulted to the petitioner for the reason that he was deprived of the right to hear vital testimony from the chief Government witness who then testified that he told the defendant of the corporation's financial condition at about the time of the inception of the alleged conspiracy which testimony the record fails to disclose was thereafter repeated.

As to Question 2:

Originally the Sixth Subdivision of Section 152, Title 18, U. S. Code, made it a crime, among other things, for an officer of a corporation, in contemplation of bankruptcy or with intent to defeat the bankruptcy law, to transfer the property of a corporation. Chapt. 575, June 22, 1938, 52 Statutes 855-6. However, during the year 1948, Congress amended the statute in several ways among which it inserted the descriptive words "knowingly and fraudulently" so that under the present Sixth Subdivision of Section 152, it is a crime for an officer of a corporation, in contemplation of bankruptcy or with intent to defeat the bankruptcy law, to "knowingly and fraudulently" transfer the property of the corporation. Chapt. 645, June 25, 1948, 62 Statutes 689.

Therefore, since the present statute was effective at the time of the alleged crime in the third count, the conspiracy contained in that third count must allege that it was a conspiracy to "knowingly and fraudulently" transfer the property. This the third count fails to do. The charging clause in that third count merely alleges "And that thereafter, in contemplation of a bankruptcy proceeding against Berkeley Jewelers, Inc. and with the intent

to defeat the bankruptcy law, the assets of Berkeley Jewelers, Inc. *would be transferred* to Berkeley Pennsylvania Corporation." (Res. App. 3a). It is apparent that the author of that indictment overlooked the 1948 amendment in drafting that indictment in 1952. A mere allegation of a conspiracy to transfer property with the omission of those essential descriptive words renders that count fatally defective, in its attempt to spell out a crime. The above quoted clause of the third count should have read, "And thereafter, * * *, the assets of Berkeley Jewelers, Inc. would be *knowingly and fraudulently* transferred * * *".

The Court of Appeals in the case at bar, in its opinion, does not directly touch upon this question of the omission of those descriptive words in the allegation of transfer in the third count but indirectly touches upon it. In discussing one of the different points raised upon the appeal, which is not urged in this petition for the reason that petitioner's contention was only supported by a decision of the District Court for the Southern District of New York in *United States* v. *Posner*, 3 F. Supp. 252, and not by any Court of Appeals decision, the Court of Appeals held that "a conspiracy indictment need not describe the substantive crime with the particularity of an indictment for that offense" and further stated that

> "The court then specified the necessary elements in this case by stating that, in order to find Switzer guilty, the jury must find 'that he conspired with others others in contemplation of bankruptcy *knowingly* to transfer property of the corporation'. This general instruction, which succintly listed the elements of the offense, was sufficient, * * *"

In the latter reference to the Trial Court's charge, it is noted that the descriptive word "knowingly" was used but the word "fraudulently" was omitted by the Trial

Court. If it is only a crime to *knowingly and fraudulently* transfer property, then it can only be a crime of conspiracy to conspire to "knowingly and fraudulently" transfer. A conspiracy to merely transfer does not allege a crime under the present statute.

The Court of Appeals' ruling in the instant case is in direct conflict with decisions of other circuits. The Court of Appeals, Third Circuit, held that the omission of an essential word or clause from an indictment rendered that indictment fatally defective even though the court knew what was intended. In *Kutler* v. *United States*, 79 F. 2d 440, the Court of Appeals stated at page 442,

> "Where an essential word or clause is omitted from an indictment, such omission is fatal to the indictment, even though the court may know what was intended."

The Court of Appeals, Ninth Circuit, held that a judgment founded upon a complaint which does not state a crime cannot be sustained. That Court of Appeals ruled in *Johnson* v. *United States*, 206 F. 2d 806, at page 808,

> "As to whether an original motion to dismiss the complaint on the ground that no cause has been stated may be made in this court, we need not concern ourselves because a judgment founded upon a complaint which does not state a crime cannot be sustained. *Sonnenberg* v. *United States*, 9 Cir., 1920, 264 F. 327."

In *United States* v. *Comstock*, 162 Fed. 415, the Court of Appeals, D Rhode Island, said at page 415,

> "The words 'knowingly and fraudulently' are an essential part of the statute, and describe an essential ingredient of the offense. The omission of these words, or any equivalent, is, in my opinion, fatal on demurrer."

In *United States* v. *Yasser*, 114 F. 2d 558, the Court of Appeals, Third Circuit, stated at page 560,

> "A necessary element of the crime described in the statute is that the defendant *knowingly and fraudulently* conceal the property. United States v. Comstock, CC. 162 F. 415; United States v. Rhodes, D. C. 212 F. 513"

The only reference to the words *knowingly and fraudulently* in the third count of the indictment relate to a description of the conspiracy but not to the alleged transfer.

The point may be raised that this question of the omission of the essential descriptive words of the transfer alleged in the third count of the indictment was first raised on the appeal to the Court of Appeals and not to the Trial Court. Reference is made to Rule 12 (b) (2) of the Federal Rules of Criminal Procedure, Title 18, U. S. Code, which provides that "the failure of the indictment or information to charge an offense may be noticed by the court at any time during the pendency of the proceeding". The Court of Appeals, Ninth Circuit, held that under said Rule 12 (b) (2) that question may be raised on appeal for the first time in *Hotch* v. *United States*, 208 F. 2d 244, 250, and in *Johnson* v. *United States*, supra.

Not only does the petitioner contend that the third count of the indictment is defective by its omission of the descriptive words "knowingly and fraudulently", but also that the Trial Court committed "plain error" by its failure to give the jury any instructions as to the definition of the word "fraudulently" in its charge to the jury as any guide for the jury to determine whether the acts complained of were fraudulently done. The Court of Appeals does not directly refer to this point on the appeal in its opinion but in discussing the evidence said "There

is little doubt but that from the testimony at trial (which included the testimony of Switzer's co-conspirators on behalf of the government) the jury could have concluded that Switzer, with intent to defeat the bankruptcy law, knowingly and fraudulently transferred property of the old corporation to the new corporation and to the favored creditors in violation of 18 U. S. C. 152." By its silence, the Court of Appeals in effect rules that the Trial Court did not commit error in failing to instruct the jury on the definition of the word "fraudulently". This is in conflict with the decisions of the Court of Appeals in other circuits and this Court. This Court in *Bollenbach* v. *United States*, 326 U. S. 607, 66 S. Ct. 402, held at page 612,

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."

In *Morris* v. *United States*, 156 F. 2d 525, the Court of Appeals, Ninth Circuit, ruled at page 529,

> "The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged."

In *Campbell* v. *United States*, 167 F. 2d 451, the Court of Appeals, Fifth Circuit, said at page 453,

> "An examination of the charge as to count I of the indictment shows that it constitutes chiefly a reading by the court of the jury of all of Section 301 and of count I. Not a word is said as to exactly what is charged in the count nor of what proof is necessary under it. We think this amounts to there having been virtually no charge, and therefore, there is reversible error."

The issue may be raised that Trial Counsel made no exception to the charge. The Courts have consistently held that even though no exception was taken to the charge where there is "plain error", the Courts may take notice of such error. That principle of law is also particularly laid down in Rule 52 (b) of the Federal Rules of Criminal Procedure, Title 18, U. S. Code. This Court followed that rule in *United Brotherhood* v. *United States*, 330 U. S. 395, 67 S. Ct. 775, by stating at page 411,

> "And though the failure to charge was not excepted to, we would not be precluded from entertaining the objection. The erroneous charge was on a vital phase of this case and affected the substantial rights of the defendants. We have the power to notice a 'plain error' though it is not assigned or specified."

In *Screws* v. *United States*, 325 U. S. 91, 65 S. Ct. 1031, this Court held at page 107,

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. * * * But there are exceptions to that rule. (citing cases). And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

The Court of Appeals further erred in its conclusion that the Trial Court specified the necessary elements of the third count when it merely charged as one of the essential elements a "transfer of the property of the corporation". The third count does not allege merely a

transfer but alleges a transfer to Berkeley Pennsylvania Corporation. Merely instructing the jury that proof of any transfer is sufficient under the third count is misleading to a jury. The jury may interpret that instruction to mean that if the Government proved any transfer to any entity that the element of the crime charged in the third count was proved. Nowhere in the charge did the Trial Court instruct the jury that it must find that Berkeley Pennsylvania Corporation was to be the beneficiary of the proposed transfer in order to find the petitioner guilty of the crime charged in the third count. This Court has held that a charge should not be misleading and that the verdict of the jury should not be based upon an erroneous presumption given it as a guide. In *Bollenbach* v. *United States*, supra, this Court said at page 614,

> "It would be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. A charge should not be misleading."

As to Question 3:

There was a substantial and prejudicial variance between the pleading and the proof in connection with the third count. The gist of that count was the transfer of the property of Berkeley Jewelers, Inc. to Berkeley Pennsylvania Corporation. Despite that restriction of allegation, voluminous testimony was introduced concerning an "independent crime", the details of which were set forth in the STATEMENT OF CASE. The third count did not allege any concealment or transfer of any property or the proceeds thereof to Bucknell Trading Corp., the bona fide creditor.

The Court of Appeals recognized that such evidence was proof of an "independent crime" by stating that

> "Switzer claims that this is evidence of an inde-

> pendent crime not charged in the indictment and also constitutes a variance between the pleading and the proof so as to expose him to double jeopardy. But the evidence was clearly admissible to show his intent and the absence of mistake, both of which had been raised by the defense. Switzer was not indicted for the crime of fraudulent transfer; and he cannot protest against a future prosecution for that offense." (Pet. App. D).

There are two objections to the introduction of that evidence of the alleged independent crime. First, since nothing was mentioned in the third count, either in the charging clauses or the overt acts, the defendant was not informed of the nature of that accusation which he was called upon to meet at the trial contrary to the provisions of the Sixth Amendment which requires that in all criminal cases, the accused shall be informed of the nature and cause of accusation. In fact, the testimony of the independent crime far outweighed the testimony of the alleged crime charged in that count, to the extent that a reading of the record would indicate that the independent crime was the subject of the trial rather than the crime charged. The Trial Court itself must have been confused as to the crime charged for in its only commentary of the evidence under the third count, it discussed the evidence of the independent crime and did not even mention anything about any alleged transfer of property from Berkeley Jewelers, Inc. to Berkeley Pennsylvania Corporation, except to state that the latter corporation would take over the so-called lay-away plan, which lay-away plan had nothing to do with the charge in the third count and was only a side issue that was not germane to the issues of the case. That commentary appears on page 301a of Respondent's appendix. It is to be noted that nowhere in that commentary does it state that the object of the conspiracy was the transfer of the Marshal's sale merchandise to Berkeley Pennsylvania Corporation which is the crime charged in the third count.

Second, it can be seen that the jury could have based its verdict on the third count on the belief that the "independent crime" was the precise crime with which the defendant was charged. This confusion is apparent even in the opinion of the Court of Appeals in this case. In its opinion, the Court below states in its opinion,

> "there is little doubt but that from the testimony at trial * * * the jury could have concluded that Switzer, with intent to defeat the bankruptcy law, knowingly and fraudulently transferred the property of the old corporation to the new corporation *and to the favored creditors* * * *".

the "and to the favored creditors", referring to Bucknell Trading Corp. was not the crime charged in the indictment.

It has long been held by this Court that a man cannot be charged with one crime and be convicted of another and that such a variance between the pleading and the proof is fatal. In the early case of *The Hoppet*, 11 U. S. 389, 7 Cranch 389, 3 L. Ed. 380, this Court held at page 394,

> "The rule that a man shall not be charged with one crime, and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced."

In *Cochran* v. *United States*, 157 U. S. 286, 15 S. Ct. 628, 39 L. Ed. 704, this Court said at page 290,

> "But the true test is * * * whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceed-

> ings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

That principle was reaffirmed in *Hagner* v. *United States*, 285 U. S. 427, 431, 52 S. Ct. 417, 419.

In *Berger* v. *United States*, 295 U. S. 78, 55 S. Ct. 629, this Court said at page 82,

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense (citing cases)."

That principle of law was accepted by various Courts of Appeals in other circuits. *See United States* v. *Wills*, 3 Cir., 36 F. 2d 855, 856; *Guilbeau* v. *United States*, 5 Cir., 288 Fed. 731, 732, 733.

Thus we find that the arguments advanced by the Court of Appeals in its opinion that the jury could have concluded that the defendant knowingly and fraudulently transferred the property of the old corporation *to the favored creditors* and that the defendant cannot protest against a future prosecution for that offense are arguments in support of a reversal rather than an affirmance of the judgment of conviction.

The difficulty with the contention of the Court of Appeals in the case at bar that the evidence of the independent crime is admissible for the purpose of showing intent or absence of mistake is that the Trial Court did not even charge the jury that it was only to be considered by it for that purpose but included that evidence of proof of the crime charged, in conflict with the decisions of the Court of Appeals of other circuits. It has been held that if proof of an independent crime is admitted for the purpose of showing intent, it is incumbent upon the Trial Court to so instruct the jury. In *Malaga* v. *United States*, First Circuit, 57 F. 2d 822, the Court said at page 825,

> "The jury was instructed that this alone was sufficient to constitute the offense set forth in the statute but it was not pointed out to the jury that this was not the offense charged in the indictment. By this instruction we think the jury must have been misled as the offense actually *charged in the indictment*. Even though the evidence warranted it, the respondent could not be convicted of an offense with which he was not charged."

In *Minner* v. *United States*, 10 Cir., 57 F. 2d 506, the Court of Appeals ruled at page 512,

> "The evidence shows that this was a separate and distinct conspiracy. It did not show that it was connected with, related to, or in furtherance of the conspiracy charged. It was inadmissible in this case for any purpose."

In the case at bar, the concealment or transfer of property or the proceeds thereof to Bucknell Trading Corp., the so-called favored creditor, had nothing to do with the alleged transfer of property from the old corporation to the new one. They were separate, distinct and independent crimes.

If the jury predicated its verdict of guilt on the proof of the independent crime and the petitioner "cannot protest against a future prosecution for that offense", he is not protected against another prosecution for the same offense.

As to Question 4:

It has been pointed out in the STATEMENT OF CASE that the Trial Court adopted the role of prosecutor by asking at least 920 questions on direct and cross-examination of witnesses, including petitioner, indicated disbelief of the petitioner's testimony, and continuously and unnecessarily rebuked the petitioner and his counsel, of which the Government in its answering brief on the appeal to the Court of Appeals states that there were 27 instances of rebuke of the petitioner. Those rebukes were based on the petitioner's unwillingness to answer without explanation questions such as "*Did you testify falsely* then or are you testifying falsely now?"

The Court of Appeals in the case at bar concludes that it sees "no impropriety of the questions", but does not even mention the continuous rebukes of the petitioner, nor the disbelief of petitioner's testimony indicated by the Trial Court. The decision of the Court of Appeals on this point is in conflict with its own decision in the case of *United States* v. *Brandt*, 2 Cir., 196 F. 2d 653, where it reversed a conviction because of the excessive examination of witnesses by the Trial Court, particularly where the questions appeared to underline inconsistencies in testimony or to elicit admissions bearing on the credibility of defense witnesses. The Second Circuit said in the *Brandt* case at page 656,

> "Beyond this the court actively cross-examined several witnesses, notably defendant Brandt himself, to a quite unusual extent. This interrupted the orderly

presentation of evidence by the defense. But further the questions appeared mainly to underline inconsistencies in the positions, or to elicit admissions bearing on the credibility, of defense witnesses."

The decision of the Court of Appeals in this case is also in conflict with the decisions of the Court of Appeals in other circuits. In *Peckham* v. *United States*, D. C. Cir., 210 F. 2d 693, the Court stated at page 702,

"* * * the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury; that, considering these matters and others, examples of which are set forth in an appendix attached hereto, this court is barred from sustaining the judgment, as to the product of a fair and impartial trial. This necessitated reversal.

The writer of this opinion feels decidedly that it would have been preferable for the court to have restrained his interruption of the examination process. The Government was well represented and the extent of the judge's participation was not required by his obligation to maintain a firm and salutary control of the proceeding."

The petitioner contends in this case that the conduct of the Trial Court deprived him of a fair and impartial trial by reason of which his constitutional rights under the "due process" clause of the Fifth Amendment were violated. In *Coplon* v. *United States*, 191 F. 2d 749, the Court of Appeals, District of Columbia Circuit, said at page 760,

"A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No convic-

tion can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty."

As to Question 5:

It has been shown under Statement of Case that the newly discovered evidence completely altered the facts of those adduced from one witness and gave strong evidence that the testimony of the other witness was at least mistaken upon which alleged facts and testimony the jury based its verdict of guilt on the second count. It has also been shown that the Trial Court added to the testimony concerning putting whatever he took under the coat.

Within the two year period prescribed by Rule 33 of the Federal Rules of Criminal Procedure, Title 18, U. S. Code the defendant made a motion in arrest of judgment and for a new trial in "the interest of justice" upon the ground of newly discovered evidence. The Trial Court denied that motion in a decision which based the denial upon three grounds (Pet. App. C) (1) That the newly discovered evidence was available to the defendant and the Court "does not believe that he first learned of Johansen's testimony only after the trial", (2) That Johansen's "testimony, while different in some details from his testimony at the trial, is consistent with the latter and does not contradict or weaken it in any matter of substance" (R. 1617). (3) That the letter from Mr. Frier's office "relates only to matter involved in the third count" (R. 1616).

In respect to the first basis of the decision, can it be conceivable that the defendant, an attorney, had such

contradictory testimony of Mr. Johansen in his possession at the trial and did not use it in his defense? It is not too presumptuous to believe that an attorney would use every bit of possible evidence to defeat a conviction. Certainly also, if the defendant were not surprised at the trial by Mr. Frier's testimony and knew at the time of the existence of the letter and its import, he would have used it at the trial. The Trial Court should view the affidavit fairly to the accused and not merely look for grounds upon which to deny a motion of this type. In *Hamilton* v. *United States*, 140 F. 2d 679, the Court of Appeals, District of Columbia, held at page 681,

> "an affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused."

In respect to the second and third basis of the denial of the motion, the defendant contends that the Trial Court misinterpreted the import of the newly discovered evidence so that its decision based on such conclusion constituted an abuse of discretion. That newly discovered evidence changed the facts upon which the jury based its verdict. Regarding the contention that the letter only relates to the third count is a clear misinterpretation of import. Certainly that letter refers to the merchandise that was involved in the third count and not the second count. That was the point raised, that Mr. Frier was confused about the subject matter of that telephone conversation if there were such a conversation. The defendant contends that any telephone conversation that Mr. Frier may have had concerned altogether different merchandise, the Marshal's sale merchandise, which was the subject of the stipulation under which possession was to be turned over to the Trustee, rather than the merchandise removed from the safe.

It has been held that the denial of a motion for a new trial is only reviewable upon the showing of the abuse of discretion on the part of the Trial Court. *United States*

v. *Johnson*, 2 Cir., 208 F. 2d 404, 405; *Crenshaw* v. *United States*, 6 Cir., 116 F. 2d 737, 741; *United States* v. *Yager*, 7 Cir., 220 F. 2d 795, 796. The next query is to determine what constitutes an abuse of discretion in the denial of such a motion. The Court of Appeals in the case at bar states in its opinion that the only value of the newly discovered evidence "is to impeach the witnesses in question". Naturally any newly discovered evidence that alters the facts testified to would impeach the witness giving that testimony. But the "interest of justice" requires that where the newly discovered evidence indicates that the testimony given at the trial was false or even mistaken it is an abuse of discretion not to grant a new trial. It has been so held in the Court of Appeals of other circuits.

In *Pettine* v. *Territory of New Mexico*, 8 Cir., 201 Fed. 489, the Court of Appeals said at page 494,

> "can it be truthfully said that it was not a gross abuse of discretion for the trial court to refuse to grant a new trial here and to refuse to exclude this false testimony from the minds of the triers of this fateful issue * * *."

In *United States* v. *Johnson*, 7 Cir., 149 F. 2d 31, the Court of Appeals ruled at page 43,

> "It is our conclusion that the proof offered in support of the original and amended motion, with the attending circumstances, unerringly points to the fact that Goldstein's trial testimony was false. The finding of the trial court to the contrary was, in our opinion, an abuse of discretion."

See also *Benton* v. *United States*, D. C. Cir., 188 F. 2d 625, 627.

In respect to the fact that the Trial Court found that though Mr. Johansen's testimony differed from his trial testimony, it was consistent with the latter and misinterpreted the import of the letter referred to from Mr. Frier's office is in conflict with the decisions of the Court of Appeals in other circuits. In *Hamilton v. United States*, D. C. Cir., supra, the Court said at page 682,

> "* * * we think it was an abuse of discretion when the trial court indulged in a hypothetical interpretation of the statement of newly discovered evidence in order to make it consistent with the testimony it was intended to rebut."

In *Smith v. United States*, 4 Cir., 281 Fed. 696, the Court of Appeals ruled at page 698,

> "In this case, having due regard to the weight properly attaching to the ruling on a motion for a new trial, we can but believe that the trial court misapprehended the facts on the original testimony, and, in our judgment, took an erroneous view of the purpose and effect of the after-discovered evidence."

As to Question 6:

A number of procedural errors at the trial have been pointed out.

(a)

The Trial Court forwarded to the jury the indictment which contained the first count not directed against petitioner in which a co-defendant, not on trial, was charged with the crime of using the mails to defraud in connection with the false financial statement to the extent of $230,000. The jury may have thought that petitioner was involved in that first count not being versed in legal

principles. Or the jury may have taken the allegations contained in that first count as proof that the petitioner had knowledge of facts contained in that statement when mailed. Or the jury may have taken those allegations as proof of the financial condition of Berkeley Jewelers, Inc. at the time of the alleged conspiracy or a combination of such proofs. In any event the Government would have no right to admit the first count into evidence at the trial. Under such circumstances the jury had no right to read that first count or even have the opportunity to read it. Under those circumstances that first count should not have been forwarded to the jury.

In the case at bar, the Court of Appeals by-passed that question altogether. That is in conflict with the decisions of other circuits. In *United States* v. *Dressler*, 7 Cir., 112 F. 2d 972, the Court of Appeals said at page 977,

> "It is inconsistent with our traditional conception of a fair trial to permit any information to go to a jury which might influence the jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged."

In *Ogden* v. *United States*, 7 Cir., 112 Fed. 523, the Court of Appeals said at page 527,

> "Trial by jury is properly surrounded by every reasonable safeguard to insure the absence of improper influence that might operate upon the minds of the jurors, * * *."

Nor is it necessary to prove that the jury did in fact read the document improperly given it. In *United States* v. *Grayla*, 7 Cir., 185 F. 2d 273, the Court of Appeals said, at page 275,

> "True, it is possible that the defendant suffered no harm by reason of the affidavit going to the jury;

in fact, it could be that the affidavit was not seen by a single member of the jury. On the other hand, it could and it might have been used effectively in persuading jurors otherwise doubtful or opposed to conviction to agree to a verdict favorable to the government. And it is sufficient to require reversal if, in our judgment, the error might have operated to the substantial injury of the defendant. See United States v. Dressler, 7 Cir., 112 F. 2d 972, 978 (and cases cited)."

(b)

Concerning the refusal of the Trial Court to admit into evidence the statement made by the petitioner after his arrest on the crime charged in the second count, which statement was made competent by the use of extracts by the Government on cross-examination and concerning which the Court of Appeals in the case at bar held was inadmissible for it "must be competent before it will be considered", such statement was made competent under the "Completeness Doctrine" or "Opening the door Doctrine". The fact that it is a self-serving document should not be the cause of its exclusion after the Government "opened the door" to its admission by cross-examining the petitioner on extracts of that statement. The document was relevant to the issues in the case. The statement contained facts about which the petitioner testified at the trial. The ruling by the Court of Appeals in the instant case is in conflict with its own decisions as well as with the decisions of other circuits.

In *United States* v. *Corrigan*, 168 F. 2d 641, the Court of Appeals, Second Circuit, said at page 645,

> "The doctrine of 'opening the door' is an application of the principle of 'completeness'; that is, if one party to litigation puts in evidence part of a document, or

a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary. The rationale of the doctrine of completeness has been stated by Professor Wigmore: 'To look at a part (of an utterance) alone would be to obtain a false notion of the thought. * * * One part cannot be separated and taken by itself without doing injustice, by producing misrepresentation'; and again, 'possibilities of error lie in trusting to a fragment of an occurrence without knowing what the remainder was'; consideration of the whole is needed 'to avoid the danger of mistaking the effect of a fragment'."

In *Affronti* v. *United States*, supra, 145 F. 2d 3, the Court of Appeals, Eighth Circuit, said at page 7,

"Another exception to the general rule is that if some portions of a statement made by a witness are used on cross-examination against him, other portions of the statement which are relevant to the subject matter about which he was cross-examined may be introduced in evidence to meet the force of impeachment."

If the Government saw fit to make use of portions of that statement, it should not object to the balance of the statement on the same subject from going into evidence. It must also be taken into consideration that even if the portions of the statement used are not inconsistent with the testimony of the witness, the use of such statement on cross-examination may give the impression of inconsistency to the lay jury.

(c)

It has been pointed out in the STATEMENT OF CASE that the Assistant United States Attorney in his summation to the jury read certain extracts of purported testimony given by the defendant to the Grand Jury. Although the prosecuting attorney cross-examined the defendant on some of the questions propounded and answers given by the defendant before the Grand Jury, some of which questions and answers the defendant stated that he had no recollection of those questions and answers purportedly given four years earlier and although the Government never offered the Grand Jury minutes into evidence, yet the prosecuting attorney read some of those extracts to the jury during his summation. True, the prosecuting attorney asked that defense counsel stipulate on the record that if the Grand Jury stenographer were called as a witness, he would testify to the accuracy of the minutes, but that stipulation is only a prelude to the admission of the document into evidence. However, the Government *never did* offer those Grand Jury minutes into evidence. Hence the Government should have been precluded from reading any excerpts of those minutes to the jury. The Court of Appeals refers to that point in its opinion and says,

> "Switzer alleges a number of errors with regard to the summations and instructions. The Assistant United States Attorney in his summation read part of Switzer's testimony given before the Grand Jury. Switzer previously had been confronted with it on cross-examination; and his counsel stipulated that the Grand Jury stenographer, if called as a witness, would testify to the accuracy of the excerpts. Thus there was no error in allowing the prosecutor to use that part of the minutes in the summation."

That is in conflict with the decisions of the Court of Appeals in other circuits. In *Tashjian* v. *Boston & Maine R. R.*, 80 F. 2d 320, the Court of Appeals, First Circuit, stated at page 321 in referring to the summation of counsel,

> "It must be confined to the evidence • • •."

In *Kline* v. *United States*, 41 F. Supp. 577, a statutory court consisting of three judges, one of whom was a judge of the Circuit Court, District of Nebraska, the Court aptly expressed the rule involved by stating at page 582,

> "The general rule of law is that nothing can be treated as evidence that is not introduced as such."

In *London Guarantee & Accident Co.* v. *Woeifle*, 83 F. 2d 325, the Court of Appeals, Eighth Circuit, said at page 432,

> "In the trial of cases to a jury in the federal courts, the arguments of counsel must be confined to the issues of the case, the applicable law, *the pertinent evidence*, and such legitimate inferences as may properly be drawn therefrom."

(d)

During the course of the trial, the Government questioned the five alleged co-conspirators concerning their testimony before either the Referee in the 21a examinations or before the Grand Jury. Each of these five witnesses were improperly asked questions which called for conclusions rather than for facts in connection with the falsity of their testimony at those previous proceedings, in four cases directly by the prosecuting attorney and in one case by the Trial Court who took over the questioning

of that witness at that point. Those improper questions and the answers thereto follow:

Witness Faskow:

"Q. Did you tell the Referee in bankruptcy anything that was not true? A. Yes, sir.

Mr. Stim: I object to that, your honor.

The Court: Overruled.

Mr. Stim: How is it binding upon us?

The Court: Overruled." (R. 143)

Witness Shulman:

"Q. Did you subsequently testify as a witness before the grand jury? A. Yes, sir. I did.

Q. Did you testify truthfully? A. No, sir." (R. 488)

Witness Mintz:

"Q. Did you tell the truth before the grand jury? A. At first I didn't." (R. 576)

Witness Shear:

"Q. Did you subsequently go into the grand jury and testify? A. Yes, sir.

Q. Was your testimony true or false? A. It was false, sir." (R. 684)

Witness Fellerman, after a discussion of a conversation with the witness, Mintz, and not the defendant:

"The Court: He (Mintz) told you what?

The Witness: He told me what I should say in the grand jury, and I said it, but I later went to the grand jury and took back that testimony and told the truth.

The Court: What it was you told the grand jury that was false?

The Witness: Yes, sir." (R. 601)

All of those questions, except in the case of the witness, Fellerman, were propounded after the respective witnesses

testified that they had conversations with the defendant about their appearance at those other proceedings giving the clear inference that their false testimony was at the urging of the defendant, except in the case of the witness, Fellerman. The Government did not even bother to point out any particular question and false answer that was given at those other proceedings. It is noted that Defense Counsel objected to the first of that line of questions. It has been held that once an objection has been made, it applies to similar questions without the necessity of repetition. In *Union Electric & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297, the Court of Appeals, Eighth Circuit, said at page 303,

> "No specific objection was made to this last question but an objection once made to a question preserves the objection to similar questions without the necessity of repetition."

For the Trial Court to permit five witnesses to give such conclusions under the inference that such false testimony was given under the direction or urging of the defendant without giving any conversation or the substance of any conversation upon which such an inference can be justified, particularly when such conclusions are not backed up with specific pointed questions and answers and the true facts involved in each instance, must have had a profound effect upon a lay jury that is unfamiliar with the rules of evidence. Furthermore, the Trial Court, further impressed those conclusions on the mind of the jury by stating in its charge at page 1417 of the record,

> "You may recall that they testified and each of them said that he testified falsely before the grand jury."

Definitely, such conclusory answers to improper questions were prejudicial to the defendant, especially when such conclusions were not based upon any factual testimony.

The Court of Appeals stated in its opinion,

> "Switzer next claims that he was prejudiced by testimony of prosecution witnesses that he told them to testify falsely when appearing before the Referee in Bankruptcy or the Grand Jury. He contends that this was improper, because it permitted the government to impeach its own witnesses and because the questions called for conclusions. Those questions were proper, as they were relevant to establish Switzer's criminal intent and were not asked for the purpose of impeachment."

The Court of Appeals fails to discuss the impropriety of the questions as calling for conclusions and only rules on the matter of impeachment. The objection on the basis of conclusion is in direct conflict with decisions of the Court of Appeals of other circuits and with this Court. In *Walker v. McLoad*, 204 U. S. 302, 27 S. Ct. 293, 51 L. Ed. 495, this Court said at page 310,

> "The statement that the chief ratified his action was a mere conclusion of law. It gave no facts upon which such alleged ratification was based, and was clearly inadmissible as proof of ratification."

See also *Public Opinion Pub. Co. v. Jenson*, 8 Cir., 76 F. 2d 494, 496.

(c)

Another incident was that a vital witness for the defense, who had been under suspoena, forwarded to the Trial Court a registered letter which contained a statement from a physician in the City of Boston in which it was stated that such proposed defense witness was under the physician's care for an acute attack of inflamed hemorrhoids and that such proposed witness would be unable to leave Boston until the end of that week and yet the Trial Court did not grant any continuance for the pur-

pose of having that prospective witness testify. That letter was received on Tuesday, April 17, 1956, the third to the last day of the trial. Despite the fact that Defense Counsel pointed out to the Court how important the testimony of that witness was to the defense, the Trial Court itself, rather than the prosecuting attorney, argued with Defense Counsel against any delay in the trial to await that person's appearance. Not only was no stipulation entered into as to what the proposed witness would testify to as requested by Defense Counsel but even the request to have the Government stipulate as to the facts contained in a written document already in evidence (Defendant's Exhibit Z) was refused by the Government. The only concession made to the defendant was a stipulation on the record to the effect that a subpoena was served by the defendant upon Mr. Shapiro in the City of New York, which called for his appearance on April 17; that the Court received a special delivery, registered letter which contained the said statement from the physician, which statement was read to the jury; that his absence was not due to the fault of either the Government or the defendant and that both desired his presence in court. The latter statement that *both* desired his presence was not consistent with a previous statement of the Government that the Governmen did not desire to call Mr. Shapiro to the stand. The above incident took thirteen pages of the record to report (R. 1054-1066) in which the Trial Court adopted the role of prosecutor in arguing against a delay rather than its judicial role after argument by counsel for both sides. The Court of Appeals failed to discuss this point in its opinion.

(f)

Another incident, though not urged in the points on appeal to the Court of Appeals, but which was brought to that Court's attention at the argument, concerned the failure of one of the Government's witnesses, Jack Shulman,

to produce certain records and documents pursuant to a subpoena duces tecum served by the defendant, without the Trial Court compelling him to do so. That witness did not claim that he did not possess those records and documents but claimed that he did not have sufficient time to gather them. That witness testified early in the trial and the incident is in the record. Of particular importance to the defendant was the production of the trust receipt agreements and related matters which were so vital to the defense of the "independent crime". The Court of Appeals opinion does not discuss this matter.

Conclusion

It is respectfully submitted that the various questions raised in this petition are of such importance in the administration of criminal law that there should be an authoritative determination of the same by this Honorable Court. Accordingly the petitioner asks that this Court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

WALTER F. MALONEY,
LLEWELLYN A. LUCE,
Attorneys for Petitioner.

APPENDIX A

Judgment of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of January one thousand nine hundred and fifty eight.

Present HON. CHARLES E. CLARK,
Chief Judge

HON. LEONARD P. MOORE,
Circuit Judge

HON. VINCENT L. LEIBELL,
District Judge
Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

MORRIS H. SWITZER,
Defendant-Appellant

ALBERT B. FASKOW, JACK SHULMAN & IRVING SHEAR,
Defendants

Appendix A

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B

Order of Extension of Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957.

MORRIS H. SWITZER,

Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 25th, 1958.

(S) JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 18th day of March, 1958.

APPENDIX C

Decision–Opinion of District Court on Motion in Arrest of Judgment and for a New Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 138–189

UNITED STATES OF AMERICA,

v.

MORRIS H. SWITZER, et al.,

Defendants.

McGOHEY, *D. J.*

The defendant, a lawyer, appearing in his own behalf, moves in arrest of judgment and for a new trial on the ground of newly discovered evidence.

On April 22, 1956, a jury found the defendant guilty on counts two and three of the instant indictment, after a trial lasting eleven days, in which he testified in his defense. He was there represented by privately retained counsel.

He was sentenced to a prison term of 18 months on the third count. A similar term was imposed on the second count but execution thereof was suspended and he was placed on probation for three years to commence at the conclusion of the prison term.

He was granted leave to appeal in forma pauperis and has done so. This motion was made pursuant to permission by a Judge of the Court of Appeals without a formal order of remand.

The second count charged that after Berkeley Jewelers, Inc. had been adjudicated a bankrupt on February 20, 1950, and a duly elected trustee had qualified on April 6, 1950, the defendant Switzer, during the month of May, 1950, unlawfully concealed from the trustee property belonging to the bankrupt estate.

The third count charged that beginning in October, 1949, Switzer and others, knowing that an involuntary petition would be filed against Berkeley Jewelers, Inc. and that the latter would lack sufficient assets to satisfy creditors' claims, conspired to effect a fraudulent transfer of its property prior to the filing of the petition.

Switzer was the attorney for Berkeley Jewelers, Inc. which conducted a retail business selling jewelry, clocks, radios and other electric appliances at discount. It had premises on the second floor of a building at 44 East 29 Street in Manhattan where its merchandise was displayed and stored. Prior to the adjudication of bankruptcy on February 20, all of the bankrupt's merchandise, except some pieces of jewelry which, being in a locked safe, were apparently overlooked, was removed from the premises under the following circumstances.

On December 15, 1949, Faskow, the bankrupt's president, signed four confessions of judgment in the amount of $1,000 each, in favor of money lenders to whom the bankrupt owed $4,000 on loans, at high interest, made several months before. Thereafter judgments were entered and executions issued, pursuant to which a sale was noticed. A relative of Switzer acted as attorney for the judgment creditors. Prior to the sale, the more valuable items of merchandise consisting of diamond

jewelry and gold rings and watches were removed at night to warehouses and also to private homes, of which some belonged to friends of Switzer. Furthermore, most of the remaining merchandise was removed from the shelves and display cases in the showroom and placed in a storeroom. On the day of the sale the door to the storeroom was closed and there was displayed to prospective buyers only that part of the bankrupt's stock which was on display in the showrooms. The safe, which was subject to a chattel mortgage, was not included in the sale. Although at first it appeared that there might be competition in bidding, this did not materialize and the entire lot of merchandise went for $1,200 and some fixtures for $100. The $1,300 had been furnished by one of the judgment creditors. The successful bidder turned out to be a young man from Massachusetts who had never been in the kind of business conducted by the bankrupt. He too was a relative of Switzer. After the sale there was removed from the premises, purportedly on the successful bidder's behalf, not only the merchandise which had been displayed at the sale but also that which had been sequestered in the storeroom. The value of all the removed merchandise greatly exceeded $1,300. The transactions above summarized constituted the basis of the conspiracy charge in the third count of the indictment.

Switzer concedes that some time in May, 1950 he, with the permission of the trustee's attorney, visited the premises in order to try to sell the safe; that he removed from the safe and brought to his own office several trays of jewelry; and that these were not turned over to the trustee or to his attorney prior to Switzer's arrest which occurred on May 31, 1950. The removal and retention of this property constituted the basis of the charge of concealment in the second count.

Switzer testified he did not intend to conceal this property; that on the contrary he promptly advised the trustee's attorney of what he had found in the safe and had brought to his office and that he would turn it over to the trustee; that his failure to do so prior to his arrest resulted solely from his preoccupation with other matters. The jury obviously did not credit this testimony.

Switzer concedes, what is in any event clear, that "the second and third counts are unrelated and independent crimes" and that the evidence alleged to be newly discovered relates only to the second count. Nevertheless, he urges, this evidence might help to bring about acquittal on the third count also, for reasons stated in his affidavit in support of this motion. There, after discussing the testimony of the witnesses Frier, Johansen and Faskow as to the matters involved in the second count, the defendant states: "The newly discovered evidence which I presently possess, in my opinion, overcomes that adverse testimony, inferences and conclusions. At least it is so strong that it taints what the Jury heard to such a degree that had the Jury heard this newly discovered evidence, it would have in all probability arrived at a verdict of acquittal. It certainly would have raised a reasonable doubt in the mind of the Jury that I was guilty as charged. It is a fair assumption additionally that had the Jury reached a not guilty verdict on the second count, it could have conceivably affected the verdict on the third count. The Jury could possibly have thought that if I were guilty of committing one crime with a small amount of merchandise involved, I was also guilty of the second crime which involved considerably more merchandise."

Frier was the attorney for the trustee. Johansen was the elevator operator at 44 East 29 Street. Faskow, president of the bankrupt, was a codefendant who pleaded guilty.

Frier testified that some time between April 6, when the trustee qualified, and the beginning of May, Switzer told him "there was nothing in the safe or in the premises that was the property of the trustee"; that some time early in May Switzer called him and said he had a prospective buyer for the safe, whereupon Frier said he would call the superintendent of the 29 Street building and tell him there was no objection to allowing Switzer to visit the premises formerly occupied by the bankrupt; that some time later he called Switzer on the telephone and told him he had learned that Switzer had removed some merchandise from the premises; that Switzer denied this; that when Frier called a second time and said he had learned that Switzer "had taken three or four trays allegedly containing certain jewelry and put them under his coat and took them in the car," Switzer admitted that he had taken them, but they were of little value and he would write Frier and would turn over the property to the trustee; that they were not turned over.

The trial transcript records Johansen as having testified that he knew Switzer, having seen him many times prior to the bankruptcy; that some time in May Switzer came to the premises alone; that "he said to me he wants to go up to the safe; he has the combination and he wants to take out what is in there in the safe"; that "he walked down to the safe, he opened the safe, I was about 20, 25 feet away from him, and he took out whatever was in there, in the safe, and he came up to me and I took him down."

Faskow testified it had been customary to keep the more valuable jewelry and watches in the safe, at least at night.

Switzer in his affidavit in support of the motion asserts that it was Johansen who testified that Switzer put under

his coat what he had taken from the safe. According to the transcript it was not Johansen who so testified but Frier. However, Switzer's counsel in summation and the Court in its charge, incorrectly attributed that testimony to Johansen rather than to Frier. Switzer asserts that his recollection is that Johansen so testified. Accordingly he contends the transcript is in error; that the "omission of that testimony [from the transcript of Johansen's testimony] was an error on the part of the Court Reporter." This contention is crucial to Switzer's present claim. The first question therefore is whether the transcript as furnished by the reporter is correct. The reporter was called and sworn. He read from his original notes. They contained only what appears in the transcript. The reporter is a man of extensive experience in this court. I have no reason to doubt either his competence or integrity, and Switzer's cross-examination did not develop any basis for doing so. I find that the reporter correctly recorded and transcribed Johansen's testimony. My trial notes agree with the transcript.

The evidence claimed to be newly discovered consists of (a) testimony by Johansen in a 21a examination before the Bankruptcy Referee, in which Johansen did not say that Switzer put under his coat what he removed from the safe; and (b) a letter addressed to Switzer by a lawyer in Frier's office on June 13, 1950.

On the argument of this motion Switzer admitted he had in court throughout the trial his file containing this letter. It is entirely clear therefore that the letter is not newly discovered evidence. Moreover, as Switzer concedes, it relates only to matter involved in the third count. Switzer's theory as to how this letter might have been used to help his defense to the second count is set forth in pp. 12 to 17 of his affidavit. It is quite involved, wholly unpersuasive and is rejected.

Appendix C

Switzer claims it was only when he began to prepare his appeal that he first learned that Johansen had testified before the Referee. It is difficult to give credence to that claim. Switzer continued to serve as attorney for the bankrupt until long after his arrest on May 31, 1950. He had the strongest possible reasons to keep informed as to all that occurred in all proceedings before the Referee. It is altogether incredible that he failed so to inform himself. He says now that, although prior to the trial and after Faskow had decided to plead guilty he secured from Faskow's attorney a set of minutes of the 21a examinations before the Referee, these contained no testimony by Johansen; that he first learned Johansen had testified there when he examined the transcript of the hearings in the Bankruptcy Court's file while preparing his appeal. The filed transcript of the hearings has been examined by me. It contains Johansen's testimony under the date July 24, 1950. There is no appearance noted for Switzer on that day. However, the transcript does show that Johansen had been sworn as a witness on June 28 and directed to appear for examination on July 24, and that on June 28 Switzer was present as attorney for the bankrupt. Thus it is clear that Switzer knew or had reason to know that Johansen was to be examined on July 24. Again it is altogether incredible that Switzer, who was then charged with the concealment, either failed to be present when Johansen testified or to take steps to learn what his testimony was. I saw and heard Switzer testify at the trial. The jury did not credit him there nor did I. I do not here. I do not believe that he first learned of Johansen's prior testimony only after the trial. Moreover that testimony, while different in some details

APPENDIX D

Opinion of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 124—October Term, 1957.

(Argued November 14, 1957 Decided January 28, 1958.)

Docket No. 24795

UNITED STATES OF AMERICA,

Appellee,

—v.—

MORRIS H. SWITZER,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*,

MOORE, *Circuit Judge*, and LEIBELL, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge*.

Morris H. Switzer appeals from his conviction of violation of the bankruptcy laws and of conspiracy. Affirmed.

Appendix D

MORRIS H. SWITZER, New York City, appellant, *pro se*.

GABRIEL B. SCHWARTZ, Sp. Asst. to U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for appellee*.

CLARK, *Chief Judge*:

Defendant, an attorney, appeals from convictions of the crimes of concealing assets from a trustee in bankruptcy, 18 U. S. C. §152, and conspiring to transfer the assets of one corporation to another in contemplation of bankruptcy and with intent to defeat the National Bankruptcy Act, 18 U. S. C. §371 and 18 U. S. C. §152. He also appeals from an order denying his motion for a new trial on the ground of newly discovered evidence.

There was evidence before the jury that Switzer's client, a corporation called Berkeley Jewelers, Inc., borrowed substantial sums from money lenders who also were represented by Switzer. The loans were necessary because the corporation was incurring large losses in its expanded "discount" operations. In December 1949, Switzer, who was well aware of the corporation's financial deterioration, proposed a plan whereby the bulk of its inventory would be transferred to a new corporation to be managed for the benefit of those creditors who were also Switzer's clients. The new corporation was then to continue the profitable portion of the old corporation's business. The persons involved agreed to the plan, and Switzer prepared confessions of judgment to the favored creditors. Prior to an arranged judicial sale much of the valuable inventory was removed from the old corporation's premises; and consequently at the sale, conducted by a "friendly" city mar-

shal, one of the conspirators was successful in purchasing its property at a low figure. The valuable inventory previously removed was then sold for the benefit of the favored creditors and Switzer; and the property purchased at the sale went to the newly organized corporation, which continued to pay the old corporation's debt to one of the creditors with whom Switzer was associated.

A little over one month later the old corporation, still represented by Switzer, consented to an adjudication of bankruptcy. After the appointment of a trustee, Switzer found out that some jewelry remained in the company's safe. He thereupon removed the jewelry and refused to return it to the trustee, although the trustee made demand for it. A portion of the jewelry was recovered upon his arrest.

Switzer was tried upon the second and third counts of an indictment, the only ones directed against him. Of these, Count 2 charged him with concealing from the trustee the jewelry he removed from the bankrupt's safe and refused to return. And Count 3 charged him with conspiring to transfer the old corporation's assets with intent to defeat the Bankruptcy Act. This relates to the whole scheme to remove the old corporation's assets from the reach of other than the favored creditors.

Switzer raises a number of points on appeal. He first asserts that the conspiracy count of the indictment was defective. It alleged a conspiracy to transfer the bankrupt's property illegally. It made no reference to concealment. This, defendant claims, rendered the indictment fatally defective, despite the fact that a conspiracy indictment need not describe the substantive crime with the particularity of an indictment for that offense. *Wong Tai* v. *United States*, 273 U. S. 77. The argument is founded on the decision in *United States* v. *Posner*, D. C. S. D. N. Y., 3 F. Supp. 252, wherein an allegation of concealment was held to be

an essential element, even though the statute used the words "transfer" and "conceal" in the alternative. The court reasoned that paragraph 1 of 18 U. S. C. §152 must be read in conjunction with paragraph 6. Paragraph 1 prohibits a person contemplating bankruptcy from concealing his assets, but nowhere is he prohibited from transferring them. Since a principal is not prohibited from transferring assets, an agent ought not to be so prohibited, for Congress would not have intended to apply a more stringent requirement to agents than to principals. Therefore, that court concluded that paragraph 6 must mean that an agent must conceal, or conceal and transfer, before criminal liability attaches.

This argument has been considered and rejected by the Courts of Appeals of the Seventh and Tenth Circuits. These decisions reason that the intent of Congress was to prevent the defeat of the bankruptcy statute and that this intent is best applied by adopting a literal reading of the statute. *United States* v. *Shapiro*, 7 Cir., 101 F. 2d 375, certiorari denied *Shapiro* v. *United States*, 306 U. S. 657; *Viles* v. *United States*, 10 Cir., 193 F. 2d 776, certiorari denied 343 U. S. 915. Although the language of the statute in question has changed, these three cases and the instant case all interpret the language of the statute as it now reads.

It is clear that the latter interpretation should be followed because the actual intent of Congress is best served by prohibiting either transfer or concealment, for either one may defeat the purpose of the Act. The difference between paragraphs 1 and 6 is more apparent than real, for a fraudulent transfer by a principal could be charged as a fraudulent concealment and the evidence of transfer would justify a finding of concealment.

Defendant also claims that the government failed to establish a *prima facie* case. He urges, with respect to Count 2, that it never proved that there was a trustee in bankruptcy from whom defendant could conspire to trans-

fer property or that the property in question was the property of the bankrupt estate; and with respect to the conspiracy count, he contends that the government failed to prove that the transfer was fraudulent. These arguments are without merit, for the government proved that a trustee was elected by the creditors, that his appointment was approved by the referee, and that the amount of his bond was fixed. The trustee then testified that he, in fact, was the trustee and acted as such. Still later Switzer testified that there was a trustee. We believe the government adequately established this fact. In addition, there was no dispute that the jewelry in question was in the possession of the bankrupt, specifically in its safe. It is immaterial whether this property was owned by the bankrupt, bailed to the bankrupt, or previously sold by the bankrupt and awaiting delivery; for in any of these events the bankrupt had a property interest in the jewelry, and for purposes of the statute, 18 U. S. C. §152, it was property of the bankrupt corporation. Defendant's last contention is based on his view of the evidence. There is little doubt but that from the testimony at trial (which included the testimony of Switzer's coconspirators on behalf of the government) the jury could have concluded that Switzer, with intent to defeat the bankruptcy law, knowingly and fraudulently transferred property of the old corporation to the new corporation and to the favored creditors in violation of 18 U. S. C. §152.

Switzer claims that numerous errors denied him a fair trial. He alleges that three errors occurred during the presentation of the prosecution's case. The first concerns evidence which was presented to show not only that defendant conspired to transfer property, but also that he actually transferred it. Switzer claims that this is evidence of an independent crime not charged in the indictment and also constituted a variance between pleading and proof so as to expose him to double jeopardy. But the evidence was

clearly admissible to show his intent and the absence of mistake, both of which had been raised by the defense. Switzer was not indicted for the crime of fraudulent transfer; and he cannot protest against a future prosecution for that offense. The pleading alleged conspiracy to transfer and the evidence established that conspiracy.

Switzer next claims that he was prejudiced by testimony of prosecution witnesses that he told them to testify falsely when appearing before the Referee in Bankruptcy or the Grand Jury. He contends that this was improper, because it permitted the government to impeach its own witnesses and because the questions called for conclusions. These questions were proper, as they were relevant to establish Switzer's criminal intent and were not asked for the purposes of impeachment. One of the witnesses was allowed to summarize his conversation with Switzer because he could not remember the precise questions, but only the gist of the conversation. But the other witnesses remembered the precise statements of the defendant, and it was only after the prosecutor had tried diligently to bring out the exact conversation that the court permitted the first witness to summarize what transpired. As for the objection that the question was double, and therefore the answer was unclear, the defense had opportunity to clarify the point on cross-examination.

Switzer's third complaint concerns his absence from the courtroom during the trial. He left the courtroom for about two minutes while Faskow, president of the bankrupt and a coconspirator, testified that he told defendant of the company's precarious condition in December 1949—the month in which Switzer proposed the elaborate plan to transfer the company's assets. But there is no irregularity here, for Switzer was absent at his own request and the judge continued only after obtaining express permission from defense counsel, who heard Faskow's answer and developed it on cross-examination. In addition, other wit-

nesses, whom defendant did hear, testified that he had told them of the insolvency in December 1949. Furthermore, there was no objection raised at the trial and Switzer was fully aware that the facts had been presented to the jury. See *Parker* v. *United States*, 4 Cir., 184 F. 2d 488.

Switzer alleges that a number of errors occurred during the presentation of his case. He claims that the trial court so repeatedly rebuked him and his counsel that it must have had prejudicial effects on the jury. But this must be considered in proper perspective. The trial lasted eleven days, and there were some 1,470 pages of transcript. The jury had ample opportunity to observe defendant while he was on the witness stand, for his testimony accounted for 399 pages of transcript. Repeatedly he was evasive and unresponsive, and the trial judge was obliged to take an active part to keep the proceedings in proper channels. Most of the judge's questions were directed toward that end. Moreover, he cautioned the jury that his instructions to Switzer had nothing to do with Switzer's guilt or innocence.

Switzer contends that it was error to allow the prosecutor to make use of his pre-trial statement during cross-examination and then refuse a defense motion to admit the document as a whole, even though many parts were irrelevant, self-serving, and did not rehabilitate him. But the defense may not introduce any statement of defendant simply because the prosecutor questioned defendant concerning its contents. The statement, like any other evidence, must be competent before it will be considered.

Switzer lists some 920 questions which he claims the court asked to his prejudice. He urges that the extensive examination by the court showed that the court adopted the role of prosecutor and further that the examination must have created an impression in the minds of the jury that the court disbelieved Switzer's testimony. A trial judge has a duty to elicit facts necessary to a clear presentation of the issues, *Pariser* v. *City of New York*, 2 Cir., 146 F. 2d 431;

but he must maintain impartiality and a courtroom atmosphere in which guilt or innocence may be solely and fairly tested. *United States* v. *Brandt*, 2 Cir., 196 F. 2d 653, 656. In the latter case we held that the 900 questions asked by the trial judge denied the accused a fair trial because they "were not of the form to elicit information or direct the trial procedure into proper channels." Moreover, they "cut into the presumption of innocence." There, the trial court actively cross-examined several witnesses, noticeably the defendant, even during direct examination; and the questioning appeared mainly to underline inconsistencies in their positions or to elicit admissions bearing on their credibility. Under the *Brandt* case whether a given question or line of questioning is designed primarily to clarify issues and elicit facts or to underline inconsistencies and elicit admissions must be decided in the light of the whole trial, for each question is usually not objectionable on its face.

Here, as the voluminous transcript shows upon examination, most of the trial judge's questions were designed to clarify the testimony and point out its relation to former testimony. The court uniformly allowed ample time for the explanation of any resulting inconsistencies and avoided personalities whenever possible. Moreover, the court did not address itself to the credibility of any witness, nor did it remark on the weight to be given to any particular piece of evidence. We see no impropriety in the questions.

Switzer alleges a number of errors with regard to the summations and instructions. The Assistant United States Attorney in his summation read part of Switzer's testimony given before the Grand Jury. Switzer previously had been confronted with it on cross-examination; and his counsel stipulated that the Grand Jury stenographer, if called as a witness, would testify to the accuracy of the excerpts. Thus there was no error in allowing the prosecutor to use that part of the minutes in the summation.

Switzer claims that it was error not to call him into the

robing room while the court ruled on requests to charge. But Rule 30 of the Federal Rules of Criminal Procedure, which provides that parties may file written requests for instructions and that the court shall inform counsel of its proposed action on the requests, does not require the court to inform a defendant represented by counsel of its rulings. Nor does it require that the defendant be present while requests are made. Moreover, this defendant certainly was not prejudiced, because he had an opportunity to propose, and did propose, additional instructions later in open court, after which he indicated that the instructions were satisfactory to him. Neither *Ah Fook Chang* v. *United States*, 9 Cir., 91 F. 2d 805, nor *Shields* v. *United States*, 273 U. S. 583, is applicable in this case as Switzer contends. In those cases the court gave additional instructions to the jury after it had retired and out of the presence of the defendant and his counsel. Thus the defense had no opportunity to correct any errors. Here, however, the discussion took place not between the court and the jury, but between the court and counsel; and there was ample opportunity to correct any error and raise objection.

Switzer alleges numerous errors in the charge despite the fact that he took no exceptions and his counsel accepted the charge as satisfactory. He contends that the court gave a one-sided view of the evidence. But the record shows that the court was summarizing uncontroverted evidence which, unfortunately for Switzer, was hostile to him. This was hardly prejudicial to any of his rights. Switzer also claims that the instructions allowed the jury to find him guilty of the conspiracy count if it believed that he transferred *or concealed* the property in question, and that the court failed to instruct the jury that it must find that the object of the conspiracy was the object alleged in the indictment. But this contention is without merit, because the judge did charge that, in order

to convict, the jurors must find that the "conspirators * * * came to a mutual understanding to accomplish an unlawful purpose" which he had already defined as knowingly and fraudulently transferring or concealing property of a bankrupt with intent to defeat the bankruptcy law. The court then specified the necessary elements in this case by stating that, in order to find Switzer guilty, the jury must find "that he conspired with others in contemplation of bankruptcy knowingly to transfer property of the corporation." This general instruction, which succinctly listed the elements of the offense, was sufficient, especially as Switzer made no objection. *United States* v. *Capitol Meats, Inc.*, 2 Cir., 166 F. 2d 537, 539, certiorari denied *Capitol Meats, Inc.* v. *United States*, 334 U. S. 812.

Lastly Switzer urges that the trial court should have granted a new trial on the basis of newly discovered evidence. After trial the defendant discovered among his files a letter over five years old from one of the prosecution witnesses which tended to indicate that the witness may have been confused as to certain testimony concerning certain dates and property. Switzer also learned that another prosecution witness had made a pre-trial statement which differed slightly from the witness' testimony at the trial. Even if this evidence is considered as newly discovered, its only value is to impeach the witnesses in question. This is not a sufficient reason to grant a new trial. *United States* v. *Hiss*, D. C. S. D. N. Y., 107 F. Supp. 128, affirmed 2 Cir., 201 F. 2d 372, certiorari denied *Hiss* v. *United States*, 345 U. S. 942.

Switzer's other allegations have been considered and rejected. They are too insubstantial to warrant discussion.

Conviction affirmed.

APPENDIX E

Pertinent Provisions of Statutes Referred to

Section 6, Municipal Court Code of the State of New York.

"§ 6. *Jurisdiction.* The municipal court of the city of New York shall have jurisdiction:

3. * * *; to render judgment on confession, without an action.

Section 130, Municipal Court Code of the State of New York.

"§ 130. *When and how issued.* An execution may be issued upon a judgment * * * by the attorney for the judgment-creditor when he appears by attorney, within the times prescribed under the provisions of article forty-two of the civil practice act, the execution being directed to a marshal * * *."

Section 660, Civil Practice Act of the State of New York.

"§ 660. *Execution; time.* A sale of property by virtue of an execution * * *, must be made at public auction between the hours of nine o'clock in the morning and six o'clock in the evening."

Section 707, Civil Practice Act of the State of New York.

"§ 707. *Notices of sale of personal property.* At least six days previous notice of the time and place of a sale of personal property by virtue of the execution must be given by posting conspicuously written or printed notices thereof in at least three public places of the town or city where the sale is made. * * *."

Appendix E

Article 3—A, Sections 50-581 of the Personal Property Law of the State of New York.

"§ 50. *Article may be known by short title.*

This article may be cited as the "uniform trust receipts law."

"§ 51. *Definitions.*

In this article unless the context or subject matter otherwise requires;

3. "Entruster" means the person who has or directly or by agent takes a security interest in goods, documents or instruments under a trust receipt transaction. * * *.

4. "Goods" means any chattels personal other than; * * *."

7. "new value" includes new advances or loans made * * *."

8. "Person" means, as the case may be, an * * * corporation * * *."

9. "Possession" as used in this article with reference to possession taken or retained by entruster means actual possession of goods. * * *."

12. "Security interest" means property interest in goods * * * and includes the interest of a pledgee, and title, whether or not expressed to be absolute, whenever such title is in substance taken or retained for security only."

14. "Trustee" means the person having or taking possession of goods * * * under a trust receipt transaction * * *."

15. "Value" means any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, " * * *, constitutes value where goods * * * are taken either in satisfaction thereof or as security."

"§ 52. *What constitutes trust receipt transaction and trust receipt.*

1. A trust receipt transaction within the meaning of this article is any transaction to which an entruster and a trustee are parties, for one of the purposes set forth in subdivision three of this section, whereby

(ii) be pursuant to a prior or concurrent written and signed agreement of the trustee to give such a writing

The security interest of the entruster may be derived from the trustee or from any other person, and by pledge or by transfer of title or otherwise.

2. A writing such as is described in subdivision one, paragraph (i), of this section signed by the trustee, and given in or pursuant to such a transaction, is designated in this article as a "trust receipt". No further formality of execution or authentication shall be necessary to the validity of a trust receipt.

3. A transaction shall not be deemed a trust receipt transaction unless the possession of the trustee thereunder is for a purpose substantially equivalent to any one of the following:

(a) In the case of goods * * * for the purpose of selling or * * * or of procuring their sale * * *."

Appendix E

"§55. *Validity between the parties.*

Between the entruster and the trustee the terms of the trust receipt shall * * * be valid and enforceable. * * *."

"§56. *Repossession, and entruster's rights on default.*

1. The entruster shall be entitled as against the trustee to possession of the goods * * * on default, and as may be otherwise specified in the trust receipt.

2. An entruster entitled to possession under the terms of the trust receipt * * * may take such possession without legal process, whenever that is possible without breach of the peace.

3. (a) After possession taken, the entruster shall * * * hold such goods * * * with the rights and duties of a pledgee.

(b) An entruster in possession may, on or after default, give notice to the trustee of intention to sell, and may, not less than five days after the serving or sending of such notice, sell the goods * * * for the trustee's account at public or private sale, * * *. The proceeds of any such sale, whether public or private, shall be applied (i) to the payment of the expense thereof (ii) to the payment of the expenses of retaking, keeping and storing the goods * * * (iii) to the satisfaction of the trustee's indebtedness. * * * Notice of sale shall be deemed sufficiently given, if in writing, and either (i) personally served on the trustee, or (ii) sent by post-paid ordinary mail to the trustee's last known business address.

(c) A purchaser in good faith and for value from an

entruster in possession takes free of the trustee's interest * * *.

4. Surrender of the trustee's interest to the ent uster shall be valid, on any terms upon which the trustee and the entruster, after default, agree."

"§ 57. *General effect of entruster's filing or taking possession.*

2. The taking of possession by the entruster shall, so long as possession is retained, have the effect of filing in the case of goods * * *."

APPENDIX F

First Count of Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—v—

ALBERT B. FASKOW, MORRIS H. SWITZER, JACK SCHULMAN and IRVING SHEAR,

Defendants.

The Grand Jury charges:

1. From on or about the 1st day of July, 1949, and continuously thereafter, up to and including February 1, 1950, at the Southern District of New York, Albert B. Faskow, the defendant, unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud the Elgin National Watch Company by inducing and attempting to induce said Elgin National Watch Company to part with its money, property and credit, in the manner and by the means hereinafter set forth.

2. It was part of said scheme and artifice to defraud that the defendant, Albert B. Faskow, on the 31st day of July, 1949, would prepare a financial statement purporting to show the financial condition of Berkeley Jewelers, Inc.

3. It was further a part of said scheme and artifice to defraud that the defendant, Albert B. Faskow, would induce and intend to induce the Elgin National Watch Company

to part with its money and property by falsely representing in the aforesaid financial statement, among other things:

(a) That Berkeley Jewelers, Inc., on the 31st day of July, 1949, had assets in the amount of $135,850.83;

(b) That Berkeley Jewelers, Inc., on the 31st day of July, 1949, had total liabilities in the amount of $43,128.07;

(c) That Berkeley Jewelers, Inc., on the 31st day of July, 1949, had a net worth of $92,722.76; whereas, in truth and in fact, as the defendant then and there well knew, the aforesaid representations were false in that on the 31st day of July, 1949, Berkeley Jewelers, Inc., had assets in the approximate amount of $83,344.68, liabilities of at least $226,497.17, and a deficit of approximately $143,152.51.

4. It was further a part of said scheme and artifice to defraud that the defendant, Albert B. Faskow, for the purpose of executing said scheme and artifice to defraud and attempting so to do, on or about the 29th day of August, 1949, in the Southern District of New York, did unlawfully, wilfully and knowingly cause to be placed in an authorized depository for mail matter to be sent and delivered to the Post Office Establishment of the United States, a letter addressed to:

Elgin National Watch Company

Elgin, Illinois

(Title 18, Section 1341, United States Code).

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FILED
MAY 26 1958
JOHN T. FEY, Clerk

No. 702 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1957

MORRIS H. SWITZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
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OPINION BELOW

The opinion of the District Court on motion in arrest of judgment and for a new trial (Pet. App. C) is not reported. The opinion of the Court of Appeals (Pet. App. D) is reported at 252 F. 2d 139.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1958 (Pet. App. A). A petition for a rehearing was denied on February 25, 1958 (R. 333a). On March 18, 1958, Mr. Justice Harlan granted an ex-

tension of time within which to file a petition for a writ of certiorari to April 25, 1958. The petition was filed on April 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error for the trial court to receive requests for instructions and a motion to dismiss by petitioner's counsel in the robing room in the absence of petitioner, and whether it was error to proceed with testimony after petitioner voluntarily absented himself from the courtroom and the court proceeded only after petitioner's counsel gave permission.

2. Whether the conspiracy count of the indictment was defective.

3. Whether it was error for the trial court to admit, in order to show intent, evidence that petitioner had withdrawn and concealed merchandise before a marshal's sale and disposed of it by private sale.

4. Whether the action of the trial court in asking questions of various witnesses prejudiced petitioner.

5. Whether the trial court erred in refusing petitioner's motion for a new trial on the ground of newly discovered evidence when it was shown that petitioner had part of this evidence with him throughout the trial and had reason to know before the trial that the other part existed.

6. Whether the Court of Appeals erred in affirming six specified actions of the trial court.

STATUTE INVOLVED

Section 152, Title 18, U.S. Code provides in part:

Concealment of assets; false oaths and claims, bribery.

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or

other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, and any property belonging to the estate of a bankrupt; or

* * * * *

Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; * * *

* * * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

On April 19, 1956, in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of a three count indictment charging him with concealing assets from a trustee in bankruptcy (count 2) and conspiring to transfer the assets of one corporation to another in contemplation of bankruptcy with intent to defeat the National Bankruptcy Act (count 3).[1] 18 U.S.C. 152, 371 (R. 310a). Petitioner was sentenced to 18 months' imprisonment on count three, and 18 months on the second count with execution suspended and probation for three years to commence at the conclusion of the prison term under count three (Tr. 1461-1462). The conviction was affirmed on appeal (Pet. App. D).

[1] The first count was directed to a co-defendant and charged him with the crime of using the mails to defraud.

The evidence may be summarized as follows:

Petitioner was the attorney for Berkeley Jewelers, Inc., which conducted a retail business selling jewelry, clocks, radios and other electric appliances (R. 7a, 8a, 16a). The business was located on the second floor of a building in Manhattan where its merchandise was displayed (R. 7a). On February 2, 1950, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York praying that Berkeley Jewelers, Inc., be adjudicated bankrupt. On February 20, 1950, the corporation was adjudicated bankrupt and a trustee was elected and qualified to act on behalf of the estate (R. 1a).

The evidence showed that beginning in 1948 Berkeley Jewelers, Inc., began to borrow substantial sums of money from various lenders, most of whom were represented by the petitioner (R. 11a, 12a, 93a, 94a, 117a, 122a, 136a, 145a, 174a). In December 1949, petitioner, who admittedly was aware that Berkeley Jewelers, Inc., was on the verge of bankruptcy, proposed a plan whereby the bulk of Berkeley's inventory would be transferred to a new corporation (Berkeley Pennsylvania) to be managed for the benefit of those creditors who were also petitioner's clients (R. 48a, 53a, 57a, 99a, 100a, 101a, 128a, 228a-230a).

On December 15, 1949, pursuant to petitioner's plan, Faskow, the bankrupt's president, signed four confessions of judgment ($1,000 each) in favor of two clients of petitioner who had lent money to Berkeley, Inc., several months before (R. 3a, 58a, 59a, 127a, 128a). Judgments were entered, executions issued, and a sale was noticed (R. 60a, 151a, 152). Prior to the judicial sale, however, petitioner removed much of the valuable inventory from the shelves and cases in the showroom

and stored it in friends' homes, in the storeroom at the rear of the showroom, and in the safe which was on the premises but not subject to sale (R. 66a, 103a, 104a, 178a, 179a, 209a, 212a, 231a). Consequently, on the day of the sale, there was displayed to prospective buyers only that part of the bankrupt's stock which was on display in the showrooms (R. 154a, 155a). The entire lot of merchandise was sold for $1,300 to a relative of petitioner (R. 121a, 132a, 158a, 159a, 182a, 185a). After the sale, there was removed from the premises not only the merchandise that had been displayed, but also that which had been locked in the storeroom (R. 68a-70a, 104a, 105a, 218a-220a; Pet. 72). Some of the property was sold for the benefit of the favored creditors and petitioner, and some went to the newly organized corporation (Berkeley Pennsylvania Corporation) (R. 77a, 106a-108a, 180a, 181a, 189a-192a; Tr. 724).

Sometime in May 1950, petitioner, with the permission of the attorney for the trustee in bankruptcy, visited the premises of the old corporation to try to sell the fixtures and safe. The elevator operator who let petitioner into the building testified that he saw petitioner remove some trays from the safe and take them with him when he left (R. 234a). Mr. Frier, attorney for the trustee in bankruptcy, testified that he was notified that petitioner had removed some trays of jewelry from the safe and that petitioner put them under his coat and left the building. After hearing this, Mr. Frier telephoned petitioner and demanded the return of the jewelry (R. 239a). Petitioner did not turn this jewelry over to the trustee or his attorney prior to petitioner's arrest on May 31, 1950 (R. 239a-240a).

Petitioner testified that he had helped Berkeley

Jewelers, Inc., obtain loans and that much to his surprise in December 1949 he learned that the firm was almost bankrupt (Tr. 886, 895, 897, 899, 900, 901, 922, 931). Mr. Faskow told petitioner that he was working on a deal that would save the firm from bankruptcy (Tr. 932, 933). In order to get time in which to negotiate the deal, confessions of judgment were given to certain creditors at petitioner's suggestion (Tr. 932, 933, 934, 935). Mr. Faskow's deal fell through, however, and judgments were entered on the confessions (Tr. 938, 939). The only merchandise removed prior to the sale was th[illegible] which belonged to the Bucknell Trading Company. The merchandise sold at the marshal's sale was turned over to the trustee later (Tr. 942, 943, 945, 958, 960). Concerning the second count (concealing property from the trustee), petitioner testified that he received permission from the trustee to enter the premises of Berkeley, Inc., to provide for the removal of the fixtures, and that while examining the safe he found several trays of cheap jewelry which he removed for safekeeping (Tr. 772, 880, 881, 1008-1012). A telephone conversation then took place between the attorney for the trustee and petitioner, during which the merchandise taken from the safe was discussed, and petitioner agreed to write a letter to the attorneys for the trustee explaining everything (Tr. 1012-1013). Before the letter could be mailed, however, petitioner was arrested. A copy of the letter was given to the arresting agents and never shown to the attorneys for the trustee (Tr. 806, 807, 808, 1013-1016).

On October 11, 1957, a few months after his conviction, petitioner filed a motion in arrest of judgment and for a new trial as to the second count (Pet. App. C). The petitioner alleged that he had discovered new

evidence which altered the facts upon which the jury based its verdict of guilty and, if introduced, the evidence might have convinced the jury that he was innocent of the charge in count two and conceivably affect their verdict on the third count (Pet. App. C-73). The evidence, claimed to be newly discovered, consisted of (a) testimony by the elevator operator in the old corporation's building at an examination before the Bankruptcy Referee in 1950 in which he did not say, as petition alleged he testified at the trial, that petitioner put under his coat the merchandise he removed from the safe; and (b) a letter addressed to petitioner by a lawyer in the trustee's office concerning some of the merchandise of the old corporation (Pet. App. C-75). The trial court denied the motion, holding that neither the letter nor the testimony was newly discovered because petitioner had the letter with him throughout the trial, and because before trial petitioner knew or had reason to know that the elevator operator was examined in 1950 (Pet. App. C). Moreover, the court found that the testimony attributed to the elevator operator was not his at all, but that of Mr. Frier.

ARGUMENT

1. While the jury was viewing evidence submitted by the prosecution, the petitioner, after notifying the court, left the courtroom for approximately two minutes. When the jury finished and the trial was about to resume, the judge, noticing that the petitioner had not yet returned, asked defense counsel "can we go ahead before he gets here * * *" (R. 51a, 52a). Defense counsel replied "[I]t is perfectly all right" and the witness went on with his testimony (R. 52a). Also, at the close of the trial the judge, while in the robing room and in the absence of petitioner, discussed with counsel for

each side the charges he would give to the jury, and petitioner's counsel renewed a motion to dismiss. Petitioner contends that the trial court in conducting these parts of the trial in his absence denied him the right under the Fifth Amendment to be present at every stage of his trial (Pet. 30-39).

Petitioner cannot complain of any deprivation of rights resulting from his first absence because that was at his own request and it was only after obtaining express permission from defense counsel that the court permitted the witness to continue testifying. Furthermore, the action that took place in the robing room did not deprive petitioner of a fair and just hearing. The Fifth Amendment requirement that the defendant be present at his trial is to afford him a full opportunity to advise with counsel and defend himself. This privilege, however, is not all-inclusive and is not applicable where the defendant's presence would be useless (see *Snyder* v. *Massachusetts*, 291 U.S. 97) as, for instance, where mechanical or formal functions are performed by counsel. *Schwab* v. *Berggren*, 143 U.S. 442; *Lewis* v. *United States*, 146 U.S. 370.

Neither *Shields* v. *United States*, 273 U.S. 583, nor *Ah Fook Chang* v. *United States*, 91 F. 2d 805 (C.A. 9), is applicable in this case. In those cases, the defendant's constitutional rights were violated when the court actually gave instructions to the jury out of the hearing of the defendant. In the instant case, the judge did not give any instructions in the robing room. He merely informed counsel as to the instructions he would give to the jury in open court. Petitioner was present when those instructions were given and had opportunity to suggest to counsel any objections he might have.

2. Petitioner contends that, in accordance with the 1948 amendment to 18 U.S.C. 152, the third count of

the indictment was defective in that it did not charge that petitioner conspired to "knowingly and fraudulently" transfer the property of Berkeley Jewelers, Inc. (Pet. 39-40). The words "knowingly and fraudulently" were unnecessary. This Court has said that an indictment for conspiracy need not allege with technical precision the elements of the crime that is the object of the conspiracy. If the indictment informs the defendant of the nature and cause of the accusation, and enables him to make a proper defense, it will be upheld. *Wong Tai* v. *United States*, 273 U.S. 77; *Thornton* v. *United States*, 271 U.S. 414. The third count of the indictment in question fully informed petitioner that he was indicted for conspiracy to defeat the National Bankruptcy Act by transferring the assets of one corporation to another in contemplation of bankruptcy.

3. During the trial, evidence was introduced showing that in furtherance of the conspiratorial intent some merchandise, concealed and withdrawn by petitioner before the marshal's sale had been disposed of by private sale (R. 68a, 69a, 70a). Petitioner contends that this was evidence of a distinct and independent crime and was improperly admitted. The evidence of the concealment of this merchandise was properly introduced to show that petitioner intended fraudulently to withhold goods from the creditors in the bankruptcy proceedings. Much latitude is permitted a court in the admission of evidence that goes to prove a conspiracy and, as the court of appeals held (Pet. App. D-83) in this case, it was reasonable to admit such testimony as an act having some bearing upon the intent of petitioner to defeat the bankruptcy laws. *Garrison* v. *United States*, 135 F. 2d 877 (C.A. 5), certiorari denied, 320 U.S. 751.

4. During the trial, the court, on numerous occasions, asked questions of the witnesses and admonished the petitioner and his counsel. This conduct of the trial court, petitioner contends, deprived him of a fair and impartial trial (Pet. 50). The trial lasted 11 days and required 1,470 pages of transcript, 399 pages of which were petitioner's testimony. Petitioner was repeatedly evasive and unresponsive and the trial court was called upon to keep the proceedings moving (Tr. 887, 936, 940, 1021, 1030, 1031, 1032, 1033, 1036, 1037, 1048, 1052, 1070, 1080, 1088-1089, 1100, 1101, 1103, 1109, 1110, 1111, 1114, 1127, 1144, 1146, 1153, 1154, 1163, 1167, 1176, 1180, 1187, 1193, 1196, 1211, 1260, 1268). Thus, when put in its proper perspective the action taken by the trial court was not that of a public prosecutor, as alleged by petitioner, but that of an impartial and unbiased referee attempting to get a clear presentation of the issues. See *United States* v. *Giallo*, 206 F. 2d 207 (C.A. 2), affirmed, 346 U.S. 929. Moreover, during the cross-examination of petitioner the court cautioned the jury that its comments to the defendant had nothing to do with the issues in the case (Tr. 1181, 1182) and in its charge to the jury the court stated (R. 291a):

> You must not draw any inferences for or against any party because of any rulings that I have made * * *. Then I must call your attention again to what I said to you during the trial. You remember while Mr. Switzer, the defendant, was on the stand I had occasion two or three times to admonish him not to be so expansive in his answers, to answer a little more sharply the questions that were put to him. That was in no sense an indication that I felt that Mr. Switzer was not trying to answer truth-

fully * * *. But it is something that you should put completely out of your minds. * * *

Further, you must not infer from the fact that I asked several questions that I have any opinion as to the facts of the case. * * *

5. Petitioner contends that the trial court erred in denying his motion for a new trial on the ground of newly discovered evidence which consisted of (a) testimony of the elevator operator given at an examination before a bankruptcy referee six years before the trial, and (b) a letter addressed to petitioner from a lawyer in the trustee in bankruptcy's office which petitioner admitted he had with him throughout the trial (Pet. 52).

Through petitioner's own admission the letter was not "newly discovered," and thus the trial court was not in error in refusing a new trial on such evidence. Moreover, the trial court rejected petitioner's "involved" theories as to why this testimony was relevant (see Pet. 22-24), finding petitioner's contention "wholly unpersuasive" (Pet. 75). The letter at best did nothing more than tend to impeach the testimony of Mr. Frier and that is not a sufficient reason to grant a new trial. *United States* v. *Hiss*, 107 F. Supp. 128 (S.D. N.Y.), affirmed, 201 F. 2d 372 (C.A. 2), certiorari denied, 345 U.S. 942. As to the 1950 testimony of the elevator operator, the trial court, after listening to argument and observing the petitioner and the other witnesses, concluded that it was unbelievable that the petitioner first learned of such testimony only after the trial (Pet. App. C-76). Moreover, the testimony attributed to the elevator operator that he saw petitioner take something from the safe and put it

under his coat was, as shown by the trial court, given by Mr. Frier, not the elevator operator (Pet. C-75). In any event, all that could be shown by the 1950 testimony would be that the elevator operator did not then say that petitioner put the material under his coat—testimony not necessarily inconsistent with statements that petitioner had done so.

6. (a) Any possible prejudice resulting from giving the indictment (containing count one which was not directed against petitioner) to the jury was dissipated by the court's clear and complete instructions to the jury that (R. 295a, 296a):

> The defendant, Morris Switzer, is charged here with two crimes. The first charge is set out in the second count of the indictment, and the second charge against him is set out in the third count of the indictment. * * *
>
> * * * * *
>
> Bear in mind that these two offenses are the only offenses with which the defendant Switzer is charged * * *. So I repeat, you have only to pass on the two charges which have been made by the grand jury here in this indictment, namely, the charge that he knowingly and fraudulently concealed property belonging to the bankrupt from the trustee, and, secondly, that he conspired with others in contemplation of bankruptcy knowingly to transfer property of the corporation.

(b) Petitioner contends that it was error to allow the prosecutor to make use of petitioner's statement after his arrest during cross-examination and then refuse a defense motion to admit the document as a whole under the "completeness doctrine" (Pet. 37). There are two requirements to the application of that

doctrine that petitioner has not mentioned. In order to introduce the remainder of a document introduced in evidence by the prosecution it must appear that the remainder is relevant to the issue and that the remainder is explanatory of the first part of the document and not merely supplementary (Wigmore, *Evidence*, 3d ed. §§ 2094, 2113). Petitioner did not attempt to show the trial court (Tr. 1278-1279), and he has not shown in his petition, that the remainder of the document sought to be introduced by him meets either of these requirements.

(c) In his summation, the Assistant United States Attorney read part of petitioner's testimony before the grand jury. Previously the petitioner had been confronted with this testimony on cross-examination and his counsel stipulated that the grand jury stenographer, if called as a witness, would testify to the accuracy of the excerpts (R. 273a, 274a). Petitioner contends that it was error for the trial court to allow the prosecutor to use excerpts from those minutes in his summation because they were never actually put in evidence as such. However, when the prosecutor repeated these excerpts he was merely restating the cross-examination, and was not reading from something that was not in evidence.

(d) During the course of the trial, the prosecution asked five witnesses if, when they testified before the grand jury and the referee in bankruptcy, they testified untruthfully and each witness answered "Yes" (Pet. 61). Petitioner contends that these questions were improper because they called for conclusions rather than facts. Whether these witnesses testified truthfully is a fact peculiarly within the knowledge of the

witness and such an answer does not infringe upon the function of the jury by asking for a conclusion.

(e) Three days before the trial ended, the defense, petitioner alleges, made a motion for a continuance in view of the fact that one of its witnesses was ill and would not be able to testify for a week (Pet. 63, 64). The trial court denied the motion and this, contends petitioner, was error. The record discloses no motion for a continuance (Tr. 1054-1066). In fact, petitioner's counsel, when confronted with the absence of the witness, said "I don't know what to do" (Tr. 1059). Finally, petitioner's counsel stated that "the defendant Switzer will be satisfied if the court instructs the jury or informs the jury that the witness, Nat D. Shapiro, was subpoenaed by the defendant to appear this morning and that a communication came in by registered mail addressed to the Court advising the Court that Mr. Shapiro is under the doctor's care and that he cannot appear at least for the rest of the week" (Tr. 1065). The court agreed and at the end of the trial that statement was read into the record before the jury. (Tr. 1284-1286). Since petitioner's wishes were complied with, he has no ground for complaint.

(f) Petitioner did not object in either the trial court or the court of appeals to the failure of a government witness to produce documents pursuant to a subpoena. Petitioner has not shown that at the trial he requested the documents and he has not shown that he was prejudiced by this failure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1958.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 702 Misc.

MORRIS H. SWITZER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner hereby respectfully petitions for rehearing this Court's decision of June 16, 1958, which denied his petition for writ of certiorari to the United States Court of Appeals for the Second Circuit which affirmed his conviction for violations of Section 152, first subdivision, Title 18, U. S. Code and Sections 371 and the sixth subdivision of Section 152, Title 18, U. S. Code upon two counts of the indictment and which affirmed an order denying his motion in arrest of judgment and for a new trial on the ground of newly discovered evidence.

(A) Statement of Grounds of Jurisdiction on Rehearing

1. The petition for the writ of certiorari was filed herein on April 25, 1958.

2. This Court denied the petition for the writ of certiorari on the 16th day of June, 1958.

3. The jurisdiction of this Court is invoked pursuant to Rule 58, subdivision 2 of the Rules of this Court.

(B) Questions Presented for Review on Rehearing

1. Whether an instruction by the Trial Court to the jury that the defendant "has a very great interest in the outcome of the trial" followed by an instruction that "that interest may cause him even unconsciously to color his testimony so as to serve his own interest" and that "it may cause him to recall more clearly those circumstances and events which promote his interest, rather than those which do not" was tantamount to an instruction that petitioner did not testify truthfully so as to strip petitioner of the competency of his own testimony contrary to the provisions of law and thus erroneously deprive petitioner of a fair and impartial trial.

2. Whether a totally one-sided review of the evidence by the Trial Court in its charge to the jury in which it completely ignored defense testimony and contentions which was tantamount to a Government summation rather than a charge to the jury and a serious distortion of the evidence by the Trial Court in its charge to the jury and the adoption of the role of a witness by the Trial Court by adding to the testimony in its charge to the jury, erroneously deprived petitioner of a fair and impartial trial.

(C) Statutes and Rules Involved

Section 3481, Title 18, U. S. Code. *Competency of accused.*

> "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

Rule 52 (b), Federal Rules of Criminal Procedure, Title 18, U. S. Code. *Harmless Error and Plain Error.*

> "(b) *Plain Error.* Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

(D) Statement of Case on Rehearing

Unfortunately this Court has seen fit to deny the petition for the writ of certiorari filed by petitioner although so many errors were committed below from which it was apparent that the petitioner was deprived of that degree of fairness and impartiality which is an American tradition and which has always been championed by this Honorable Court in the true administration of justice.

Before the petitioner was able to submit a reply to the brief interposed by the Government, which was in preparation, in which it would have been shown to this Court that the citations advanced by the Solicitor General were not controlling in this case, this Court rendered its decision. Since the rules of this Court restrict a petition for rehearing to substantial grounds available to petitioner although not previously presented, this petition for re-

hearing will be confined to such other new substantial questions. Petitioner respectfully requests this Court on this petition to reconsider its previous decision not only in the interest of justice to this petitioner but also because of its importance in the administration of criminal law.

In its charge to the jury, the Trial Court impressively stressed the interest of the petitioner in the outcome of the trial by stating

> "However, I shall point out to you that Switzer, the defendant who is on trial here, obviously has a very great interest in the outcome of the trial. That is perfectly obvious to you" (Res. App. 293a).

Subsequently, the Trial Court in its charge to the jury made a general remark and observation, the import of which was equivalent to a statement that the petitioner did not testify truthfully at the trial. The Trial Court stated to the jury,

> "However, when a witness has an interest in the outcome of any case, that interest may cause him even unconsciously to color his testimony so as to serve his own interest. It may cause him to recall more clearly those circumstances and events which promote his interest, rather than those which do not" (Res. App. 294a).

It must be borne in mind that a lay jury is not conversant with principles of law and in fact is bound to accept the law as laid down by the Trial Court. The jury hangs on its words. Here, the Trial Court instructed the jury as a matter of law that a witness who has an interest in the outcome of the trial, (and it charged the jury as a matter of law that this petitioner had a great interest in the outcome of the trial), may even unconsciously color his testimony is in effect an instruction that such an

interested witness is unworthy of belief. Such an instruction strips the testimony of a defendant of its competency contrary to the provisions of law promulgated by Congress. Congress, in its wisdom, has seen fit to make the testimony of an accused person competent whereas such instructions to the jury practically directs them to disregard the defendant's testimony since it may be colored unconsciously. This subject will be treated in REASONS RELIED ON under Question 1.

It will be recalled that petitioner, an attorney at law, was charged in the third count of the indictment, in substance, with a conspiracy to transfer the property of a corporation in contemplation of bankruptcy and with the intent to defeat the bankruptcy law (Res. App. 2a-4a). At the trial, the Government offered proof in substantiation of that charge that the property of the corporation was bought in by a nominee of the defendants at a City Marshal's sale upon judgments entered upon confessions executed and delivered by the corporation to a creditor. In further substantiation of that charge, the Government offered proof that quantities of merchandise were removed from the bankrupt's premises and sold privately with the proceeds thereof being used in partial liquidation of the indebtedness to another creditor.

In connection with the removal of quantities of merchandise from the bankrupt's premises and its subsequent disposal, the petitioner contended and so testified that the merchandise so removed and so disposed of was removed and disposed of lawfully under pledges contained in trust receipt transactions between the bankrupt and that creditor. The defense not only gave oral testimony on that point (R. 942-945) but also put into evidence one of the executed trust receipts (R. 319-20, Defendant's Exhibit C). Furthermore two Government witnesses admitted on cross-examination that there were trust receipt transactions between Berkeley Jewelers, Inc., the bankrupt, and

Bucknell Trading Corp., the creditor, in which merchandise of Berkeley Jewelers, Inc. was pledged to Bucknell Trading Corp. and upon default of the obligation, Bucknell Trading Corp. was entitled to possession and disposal of the pledged merchandise in liquidation of the indebtedness.

Despite that testimony and the exhibit, the Trial Court in its charge to the jury failed completely to even mention that matter of defense. *In fact, the Trial Court did not even mention the words "trust receipt" in its charge to the jury.* By merely summarizing the evidence offered by the Government without giving any mention whatsoever to the defense testimony or contentions not only rendered that charge one-sided but in effect made it tantamount to a Government summation against the defendant rather than a charge to the jury. The only commentary on the evidence under the third count made by the Trial Court in its charge to the jury reads as follows:

> "The Court: (Continuing) It is not disputed, for instance, that on December 15, Faskow, president of Berkeley Jewelers, Inc., signed four confessions of judgment in four named actions where the claim (1404) in each action was $1,000. He executed those confessions of judgment. They were in the name of Fellerman. That was based on the arrangement between Mintz and Fellerman. It was money that Mintz and Fellerman had jointly advanced to him in the sum of $4,000. It is not disputed that those executions of judgment were filed in the Municipal Court. The judgments were issued and pursuant to the execution the Marshal made a levy, and, ultimately, the Marshal made a sale.
>
> It is not disputed that at that sale a large amount of merchandise was purchased by money supplied by Mintz, $1,300. Everybody has testified, as I recall it that the merchandise that was taken for that $1,300 was worth a great deal more.

It is not disputed that large amounts of this merchandise were removed from the premises on 29th Street, some time at night. They were moved to private homes on Long Island and to various warehouses, and that some of the merchandise was sold at private sales, that is, at Lipson's home. Furthermore, it is not disputed that along in (1405) January a certificate of incorporation was filed for a new corporation to be known as the Berkeley-Pennsylvania Corporation, and that the purpose and arrangement was that the Berkeley-Pennsylvania Corporation would take over the so-called lay-away plan that Mr. Faskow had been operating.

Now, Fasko, Shulman and Shear have given their versions as to the circumstances under which these various things were done, and Switzer has given his.

Faskow has told us that in December bankruptcy was imminent and that he talked about it to Switzer. Switzer says he didn't know that there was danger of bankruptcy, that up until the collapse of what he called the Shapiro negotiations for new money he thought everything was going to be all right and that the corporation could survive and pay its debts. He says he was amazed and shocked and when he found out that Faskow had so many outstanding obligations as he told him about and that there was no intention at any time to take away any property that might belong to the trustee, there was no contemplation of bankruptcy, and that, in any event, whatever he did he didn't do in conspiracy with anybody else" (Res. App. 301a-302a).

In that commentary the Trial Court referred to the removal of the merchandise from the bankrupt's premises and its subsequent disposal by saying

"It is not disputed that large amounts of this merchandise were removed from the premises on 29th

> Street, some time at night. They were moved to private homes on Long Island and to various warehouses, and that some of the merchandise was sold at private sales, that is, at Lipson's home."

Yet nothing is stated there concerning the defense testimony of the removal and disposal of that merchandise under the pledges of the trust receipt transactions. This matter will be discussed under REASONS RELIED ON under Question 2.

The next item under this point is that the Trial Court distorted a portion of the testimony under that third count. After the Trial Court said "It is not disputed that at that sale a large amount of merchandise was purchased by money supplied by Mintz", the Trial Court subsequently said that "*It is not disputed* that large amounts of *this* merchandise were removed from the premises", "were removed to private homes on Long Island", "and that some of the merchandise was sold at private sales, that is, at Lipson's home." An analysis of that commentary indicates that the Trial Court held that the merchandise referred to was part of the merchandise sold at the Marshal's sale and that such an alleged fact was undisputed. That alleged fact was violently disputed by petitioner at the trial. The defendant testified that the trust receipt merchandise was removed from the premises not only before the Marshal's sale but even before the Marshal made the levy. In fact, such testimony was even given in response to a question propounded by the Trial Court itself, as follows:

> "The Court: It was taken out before the Marshal made his levy?
>
> The Witness: It was taken out before the Marshal made his levy" (R. 945).

By instructing the jury that such alleged fact was undisputed whereas it was in fact disputed was a distortion of the testimony actually given. This matter of distortion of the evidence will also be discussed under REASONS RELIED ON under Question 2.

The second count charged the petitioner, in substance, with the crime of concealing assets of the bankrupt from the Trustee. That count concerned the cheap jewelry items of rather inconsequential value that were removed from the safe after the attorney for the Trustee had given permission to the petitioner to enter upon the premises formerly occupied by the bankrupt. One of the witnesses to that alleged crime was a Mr. Johansen, the elevator operator of the premises. The Trial Court, in discussing his testimony in its charge to the jury, said,

> "Then it was the testimony of Carl Johansen, the elevator operator, that he saw Switzer come in and go to the safe and saw him take something out and put it under his coat and leave the building" (Res. App. 299a).

The record does not disclose that Mr. Johansen had testified that he saw the defendant put whatever he had taken from the safe under his coat. The record discloses that the only testimony given by anyone concerning the defendant putting the removed merchandise under his coat was given by Mr. Frier, the Attorney for the Trustee, who was not an eye-witness to the incident. He was merely a hearsay witness on that point and he only testified that in a telephone conversation with the defendant he told the defendant that he, Mr. Frier, was informed that the defendant had put under his coat what had been removed from the safe (R. 780).

In its decision on the motion in arrest of judgment and for a new trial upon the ground of newly discovered evi-

dence, the Trial Court conceded that the Court was in error in attributing that testimony to the eye-witness, Mr. Johansen. The Trial Court said in that decision,

> "the Court in its charge, incorrectly attributed that testimony to Johansen rather than to Frier" (Pet. App. 75).

There can be no denial that a statement of an alleged fact by the Trial Court in its charge could carry great weight with a jury particularly after a lengthy trial at which much testimony was adduced. Nor can there be a denial that attributing that testimony to an eye-witness rather than a hearsay witness would carry greater weight against a defendant. The Trial Court recognized the importance of whether or not Mr. Johansen had testified to that alleged fact for it stated in its decision,

> "This contention is crucial to Switzer's present claim" (Pet. App. 75).

The Trial Court thought it of sufficient importance to hold a hearing at which the Court Reporter was called as a witness and testified as to whether or not Mr. Johansen had so testified (Pet. App. 75). The Trial Court then concluded,

> "I find that the reporter correctly recorded and transcribed Johansen's testimony. My trial notes agree with the transcript" (Pet. App. 75).

The fact that the Trial Court's notes confirms that Mr. Johansen did not so testify causes the error of the Trial Court to be more grievous. Had the Trial Court consulted its trial notes in the preparation of the charge, that misstatement of fact could have been avoided. In any event, the fact that the Trial Court attributed that testimony to Mr. Johansen would have the same effect upon the jury as though Mr. Johansen had so testified. Thus, here we have an instance where the Trial Court added to the testi-

mony and conceded that it had done so on a matter that was "crucial to" the defendant's claim on the motion in arrest of judgment and for a new trial. The importance of such testimony is that it conveyed the impression that the defendant acted surreptitiously while removing the safe merchandise from the premises whereas the 21a testimony of Mr. Johansen revealed that the defendant acted openly.

That matter of adding to the testimony will likewise be discussed under REASONS RELIED ON under Question 2.

(E) Reasons Relied On

As to Question 1:

Congress had seen fit to permit a defendant accused of an offense against the United States to testify in his own behalf and be a competent witness by the enactment of a statute which is presently designated as Section 3481, Title 18, U. S. Code. That provision of law would be rendered useless in any case in which the Trial Court arbitrarily instructs a jury either directly or inferentially that the testimony of the accused is not worthy of belief. Should the Trial Court make some comment in its charge which can be considered to mean that the testimony of an accused is untruthful merely because he is the accused, that in effect would be tantamount to an instruction that the jury is to disregard or not give any weight to the defendant's testimony. In the case at bar, after the Trial Court instructed the jury that the defendant had a very great interest in the outcome of the case, it then made a general observation that the interest of a defendant in a criminal case would cause him unconsciously to color his testimony and make him recall only those circumstances and events which promote his interest rather than those which do not.

What can that mean to a lay jury which is bound to accept the instructions of the Trial Court as binding and which would be inclined to treat the observation of a Trial Judge with the deepest respect? It can only mean that defendants in criminal cases cannot be expected to tell the truth and therefore the jury should not believe the petitioner in the instant case. That even if the defendant intended to testify truthfully, his testimony would still be unworthy of belief for he may unwittingly testify falsely. Such an instruction strips the competency of an accused's testimony and negates the provisions of law enacted by Congress. If the testimony of the accused is not to be believed, it can have no competency to the case. If the testimony of the accused is not to be believed, why permit him to testify at all? Under such circumstances, giving an accused the right to be a witness in his own behalf would be a farce and meaningless.

In *Hicks* v. *United States*, 150 U. S. 442, 14 S. Ct. 144, this Court was confronted with a similar situation. In the *Hicks* case, the Trial Court instructed the jury that the defendant had an interest in the case and then made a general observation that anyone in the defendant's position might be led away from the truth because of that interest. This Court, in reversing the judgment of conviction in the *Hicks* case said at page 450,

> "Another assignment seems to us to present a substantial error. This has to do with the instructions by the learned judge to the jury on the weight which they should give to the testimony of the accused in his own behalf."

The Court went on further at page 451,

> "The learned judge further, in his instructions, argued to the jury that in considering the personal testimony of the accused they should consider this interest in

this case.' 'You are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case; the largest, perhaps, we could have under any circumstances in life; and such an interest, consequently, as might cause us to make statements to influence a jury passing upon our case that would not be governed by the truth. We might be led away from the truth because of our desire. Therefore, it is but right, and it is but your duty, to review the statements of such a witness in the light of his attitude and in the light of the other evidence.'

It is not easy to say what effect this instruction had upon the jury. * * * It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and perhaps a judge cannot be considered as going out of his province in giving similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be a competent witness.' The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law."

In *Allison* v. *United States*, 160 U. S. 203, 16 S. Ct. 252, this Court reaffirmed the principle laid down in the *Hicks* case. In the *Allison* case, the Trial Court instructed the jury that it is to look at the statements of the defendant in the light of the interest he has in the result of the case. This Court in the *Allison* case reversed the judgment of conviction and said at page 207,

> "And it was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight, under all the circumstances, as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by law.
>
> We repeat what was said by Mr. Justice Shiras, speaking for the court, in Hicks v. U. S., 150 U. S. 442, 452, 14 Sup. Ct. 144: (Citing the last paragraph of the preceding citation, except for the first sentence.).

In *Quercia* v. *United States*, 289 U. S. 466, 53 S. Ct. 698, the Trial Court made a comment to the jury that the defendant wiped his hand during the giving of his testimony and that such a mannerism indicated to the Trial Court that a person exhibiting such a mannerism was not telling the truth. The Trial Court, however, instructed the jury that its opinion of the evidence was not binding on the jury and that if the jury did not agree with the Trial Court, it should find the defendant not guilty. In reversing the judgment of conviction, this Court said at page 472,

> "* * * but in a sweeping denunciation repudiated as a lie all that the accused had said in his own behalf which conflicted with the statements of the government's witnesses. This was error and we cannot doubt that it was highly prejudicial.

> Nor do we think that the error was cured by the statement of the trial judge that his opinion was not binding on the jury and that if they did not agree with it they should find the defendant not guilty."

Likewise, in the case at bar. After the Trial Court, in effect, instructed the jury that a defendant, having an interest in the outcome of the trial, could not be believed, any further instructions that the jury is to pass upon the credibility of the defendant's testimony would be ineffectual and unavailing in view of the prejudice caused by the comments of the Trial Court.

The issue may be raised that Trial Counsel for petitioner made no exception to the charge. The Courts have consistently held that even though no exception was taken to the charge where there is "plain error", the Courts may take notice of such error. That principle of law is laid down in Rule 52 (b) of the Federal Rules of Criminal Procedure, Title 18, U. S. Code. In *United Brotherhood v. United States*, 330 U. S. 395, 67 S. Ct. 775, this Court ruled at page 411,

> "And though the failure to charge was not excepted to, we would not be precluded from entertaining the objection. The erroneous charge was on a vital phase of this case and affected the substantial rights of the defendants. We have the power to notice a 'plain error' though it is not assigned or specified."

See also *Brasfield v. United States*, 272 U. S. 448, 450, 47 S. Ct. 135; *Screws v. United States*, 325 U. S. 91, 107, 65 S. Ct. 1031.

As to Question 2:

It has been shown in STATEMENT OF CASE that the Trial Court in its charge to the jury, in which it gave a commentary on the evidence under the third count committed two errors. First, it failed to discuss the defense testimony to the effect that the merchandise taken from the bankrupt's premises was removed under pledges of trust receipts as well as the defense contention that the removal and disposal of that merchandise was lawfully done under the Trust Receipt Law of the State of New York. Second, the Trial Court adopted the role of a witness by instructing the jury that it was undisputed that the merchandise removed was part of the merchandise that was sold at the Marshal's sale, particularly when such testimony was disputed by the defendant. The conclusion reached by the Trial Court was at least a distortion of the evidence. Third, it has further been pointed out that in its discussion of the testimony under the second count, the Trial Court added to the testimony by attributing to an eyewitness, testimony given by a hearsay witness thus giving the impression to the jury that petitioner acted surreptitiously. That testimony concerned the matter of putting "under his coat" what the defendant had removed from the safe.

In its opinion, the Court of Appeals failed to touch upon these points raised under this question. The negative action of the Court of Appeals is contradictory to the decisions of this very Court. In *Starr* v. *United States*, 153 U. S. 614, 14 S. Ct. 919, this Court said at page 626,

> "* * * The evidence, if stated at all, should be stated accurately, as well that what makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be

studiously avoided. They can hardly fail to mislead the jury and work injustice. Burke v. Maxwell, 81 Penn St. 139, 153. See also 2 Thompson on Trials, Secs. 2293, 2294, and cases cited.

It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. Hicks v. United States, 150 U. S. 442, 452."

In *Quercia* v. *United States*, 289 U. S. 466, 53 S. Ct. 698, supra, this Court, in reversing a judgment of conviction, stated at page 470,

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon the testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. * * * This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead and especially that it should not be one-sided.'"

Conclusion

It is respectfully submitted that the various new questions raised in this petition for rehearing are of such importance in the administration of the criminal law that there should be an authoritative determination of the same by this Honorable Court and that the interests of justice would best be served by a review of this case. Accordingly, the petitioner respectfully requests that this Court

grant this petition for rehearing and upon such rehearing issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

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Attorneys for Petitioner

Certificate

We hereby certify that this petition is presented in good faith and not for the purpose of delay. We hereby further certify that this petition is restricted to other substantial grounds available to petitioner although not previously presented to this Court in the petition for the writ of certiorari.

Dated, July 10, 1958.

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